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In the Supreme Court of the United States

OCTOBER TERM, 1925

Nos. 288 and 289

THE UNITED STATES, APPELLANT

v.

SWIFT AND COMPANY

SWIFT AND COMPANY, APPELLANT

v.

THE UNITED STATES

ON APPEAL AND CROSS APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the Court of Claims is reported in 59 Ct. Cls. 364, and appears also at R. 55–84.

GROUNDS OF JURISDICTION

The judgment to be reviewed, bearing date of March 17, 1924, appears at R. 84. By its terms the Court of Claims adjudged that Swift and

Company (hereafter called the claimant) should recover the sum of $1,077,386.30 from the United States (hereafter called the defendant).

The claim was for an alleged breach of contract in refusing to accept a large amount of Army bacon manufactured by the claimant for delivery to the defendant during March, 1919. The defenses were interposed that no contract in fact existed; if there was a contract it was not reduced to writing as provided by Rev. Stats. 3744; that the alleged contract was not signed by a duly authorized contracting officer; that if there was a contract good in law for the January, February, and March, 1919, bacon, it was abrogated by the mutual consent of the parties; and that the claimant did not use due diligence in disposing of the bacon after receiving notice that the Government would not take it. A counterclaim also was filed alleging overpayments to the claimant for bacon delivered during preceding months.

From this judgment both parties have appealed; and their cross-appeals have been consolidated to form the present case. Swift & Company appeals on the ground that judgment should have been rendered for the full amount claimed in the petition, namely, $1,459,885.09 (cf. R. 5, 8, 11, 14, 15). The United States appeals on the ground that no judgment should have been entered for the claimant.

In the court below the United States also put in the counterclaim for the sum of $1,571,882.00

(R. 18–25). Judgment was given against the United States on this counterclaim. From the portion of the judgment dismissing the counterclaim the United States does not press its appeal.

The Court of Claims on March 17, 1924, handed down its findings of fact (R. 26–54), conclusions of law (R. 54–55), and opinion (R. 55–84). Judgment was entered as set forth above. The United States moved for an amendment of the findings of fact and for a new trial. The claimant also moved for a new trial. All these motions were overruled (R. 85), and both sides then appealed.

The appeals in this case were taken on January 26, 1925, under the authority of Section 242 of the Judicial Code as it existed prior to the recent amendments. (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157.)

STATEMENT OF CASE

This case involves the question whether the Secretary of War, in pursuance of Rev. Stats. 3744, caused contracts for the War Department to be reduced to writing and signed by the parties with their names at the end. Certain letters, quoted in findings of fact No. XVI of the court below (59 Ct. Cl. 378–382; R. 36–39), are the writings asserted by claimants to constitute a contract binding on the United States. A further question is whether partial performance was sufficient to take the matter out of the requirements of Section 3744 so as to make the United States liable in damages for a

breach of the alleged contract. The essential facts leading up to the controversy, as found by the court below, are as follows:

The Secretary of War by an order dated April 12, 1917, declared that an emergency existed within the meaning of Rev. Stats. 3709, and other statutes which except cases of emergency from the requirements that War Department contracts shall be made only after advertising. (R. 26–27.) That order directed that until further notice such contracts should be made without resort to advertising. In the early days of the emergency the usual advertising for bids and letting of contracts to the lowest bidders was adhered to, but later on, in 1917 and during 1918, such advertising became impracticable and was abandoned, resort being had to other methods of purchase. (R. 31.)

Colonel, later General, Albert D. Kniskern was directed by War Department order dated April 24, 1917, to "assume charge of the general depot of the Quartermaster Corps at Chicago, Ill." (R. 27.) By a similar order dated August 20, 1917, Captain Otto F. Skiles was directed to proceed to Chicago for duty as assistant to General Kniskern. (R. 27.) The latter was on duty in Chicago as Depot Quartermaster (R. 27) or Zone Supply Officer (R. 29) until September 1, 1919 (R. 27); that is, during the entire period in which this controversy arose.

Pursuant to order No. 491 dated July 3, 1918 (copy of which is printed in the Appendix hereto,

page 100), from the office of the Quartermaster General of the Army, there was established a packing house products branch of the subsistence division—one of the five different divisions—of the Quartermaster General's office, this branch to be located in Chicago in the office of the Depot Quartermaster, and to be under his immediate direction and control, and responsible to him for all matters pertaining to the procurement, production, and inspection of packing-house products, subject to the control of the Quartermaster General. (R. 29.) At this time said "packing-house products branch of the Quartermaster General's office" had jurisdiction over the purchase of the bacon here in controversy, subject to the control of the Quartermaster General. This jurisdiction was continued after the transfer of the division on November 7, 1918, to the newly created office of the Director of Purchase and Storage (R. 28, 31), and the change in designation of the Depot Quartermaster—General Kniskern—to Zone Supply Officer. (R. 29.)

On September 17, 1918, Captain Jay C. Shugert was designated by the Acting Quartermaster General as *purchasing and contracting officer for the packing-house products and produce division* of the office of the Depot Quartermaster of Chicago. (R. 31.) After a previous transfer order, by order of February 15, 1919, Captain Shugert was announced as officer in direct charge of the Chicago office packing house products branch, subsistence

division, of the office of Director of Purchase and Storage. (R. 31.) The control of the division had been transferred as hereinbefore stated on November 7, 1918, from the Quartermaster General to the Director of Purchase and Storage. Such transfer appears to have been only a paper transfer—a mere change in designation of officials. (R. 28, 31.) Of course, there were corresponding changes down the line from Kniskern as Depot Quartermaster to Zone Supply Officer (R. 29) to Captain Shugert from contracting officer in the office of the Quartermaster General to the office of Director of Purchase and Storage (R. 31).

The defendant may interpolate here to state that it believes these changes in office organizations to be relatively unimportant; for, after all, the offices, as such, had no power to contract on behalf of the United States, nor did they attempt to do so. The simple question remains, as set forth in the outset of this statement of the case, namely, whether the letters quoted at pages 36 and 39 of the record constitute a contract within the requirements of Rev. Stats. 3744, and if not, whether under the circumstances disclosed by the facts found below partial performance was sufficient to hold the United States liable in damages for its refusal to accept or pay for the March, 1919, bacon in controversy.

Army bacon requires not less than thirty days for curing and eight days for smoking. (R. 43, 46.)

After the suspension of advertising for bids for that product, the Depot Quartermaster, later Zone Supply Officer, at Chicago, General Kniskern, and his assistants, adopted the plan of calling in conference representatives of the packers, including Swift and Co., and advising them of the requirements of the Government for a stated period, usually three months. The packers thereupon furnished statements, in writing, as to the quantities they could furnish, and the Quartermaster General then made an allotment to each packer, and notified each as to the quantities it would be expected to furnish. (R. 32.) Subsequent to August 16, 1918, such allotments were made by the Chicago office of the Food Administration (R. 35), which was in charge of one Maj. E. L. Roy (R. 36), and which Administration had been established on August 10, 1917, by the President under the Food Control Act of August 10, 1917 (40 Stat. 276) (R. 33, 34.) Prices for the last four months of 1918 had been fixed by the Food Administration on the basis of cost of production, plus profit, within the limits fixed by the Food Administration license, at about the first of each month and on data furnished by the packers. (R. 43.)

It was after such a conference held on November 9, 1918 (R. 36), that the letter of November 12, 1918—one of the letters relied upon by Swift and Co. as constituting a contract in this case—was

written by Swift and Co. to the Depot Quartermaster as follows:

SWIFT & COMPANY,
UNION STOCK YARDS,
Chicago, November 12, 1918.

WAR DEPARTMENT,
General Depot of the Quartermaster Corps, 1819 West 39th Street, Chicago, Illinois.

Attention Maj. Skiles.

GENTLEMEN: Referring meeting in your office Saturday, November 9th, please be advised we offer for delivery during January, February, and March, 1919:

and 17,500,000 lbs. serial 10 bacon
4,000,000 lbs. serial 8 bacon

21,500,000 lbs.

We offer for delivery each month as shown under:

	Serial No. 10	Serial No. 8.
January	6,000,000	1,400,000
February	5,500,000	1,200,000
March	6,000,000	1,400,000
Total	17,500,000	4,000,000

You will note we are offering a larger proportion of Serial No. 10 than of Serial No. 8 bacon. This because we have gone to great expense in equipping canning rooms at Chicago, Kansas City, and Boston on the understanding that you very much preferred Serial No. 10 bacon to Serial No. 8. The amount Serial 10 given above is the mini-

mum amount required to enable us to operate our canning rooms at fair capacity. If necessary, we are willing to have our offers Serial 8 bacon increased and Serial 10 decreased proportionately to the extent you find necessary, bearing in mind that we will appreciate as liberal a proportion of Serial No. 10 bacon as possible.

Will you kindly advise if we shall figure to put down above amounts for delivery as shown. After receipt of such advice we will furnish you with statement of amounts we will put in cure at each plant.

Yours respectfully,

SWIFT & COMPANY,
Per GFS, Jr.

Prov. Dept. JH–JL.
United States Food Administration, License No. G–09753.

On November 26, 1918, General Kniskern " by O. W. Menge, 2nd Lieut. Q. M. Corps," wrote a letter to the Chicago office of the Food Administration requesting it to make an allotment to Swift and Company for the months of January, February, and March, 1919, of the amounts of Serial #10 bacon set out in the aforesaid letter of November 12, 1918. (R. 37.) Why no action was taken as to the Serial #8 bacon offer in said letter of November 12 is not shown by the findings of the court below. The allotment was made as requested by letter of December 3, 1918, " the price to be determined later." (R. 38.) Swift & Company indicated its acceptance of this allotment by writing

below the stamped word "accepted" the following: Swift & Company, By G. F. S., Jr., 12/11/18," and returned it to the Food Administration. (R. 39.)

On December 10, 1918, the following letter was sent to Swift & Company:

> (War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.)
>
> DECEMBER 10, 1918.
>
> Address reply to Depot Quartermaster, Marked for attention Div. 1-1-b, and refer to File No. 431.5 P&S-PC.
>
> From: Officer in charge Packing House Products Br., Subsistence Div., office Director of Purchase and Storage.
>
> To: Swift & Co., Union Stock Yards, Chicago, Ill.
>
> Subject: Bacon Serial 10, January, February, and March.
>
> 1. In connection with the offers you made to this office on bacon, Serial 10, for delivery during the months of January, February, and March, you will please find indicated below the schedule of deliveries this office requests you to make.

January	6,000,000 lbs.
February	5,500,000 lbs.
March	6,000,000 lbs.

> 2. In order that proper arrangements can be made and all concerned informed accordingly, you are further requested to advise

this office by return mail where you contemplate putting up these allotments.

By authority of the Director Purchase and Storage.

A. D. KNISKERN,
Brigadier General, Q. M. Corps,
Officer in Charge.

By O. W. MENGE,
2nd Lieut., Q. M. Corps.

OWM: MJB

Special attention is invited to the fact that all of these letters were subsequent to November 11, 1918, the dead line fixed by the Dent Act of March 2, 1919 (40 Stat. 1272).

General Kniskern was instructed by telegram on December 16, 1918, from Washington, signed "Wood, Subsistence, Baker," under whose supervision and control he was (R. 30), that—

> Effective with January requirements, the Army will purchase packing-house products independently of the Food Administration. This office is notifying Food Administration accordingly. You are authorized to proceed on this basis. (R. 44.)

On December 19, 1918, the Depot Quartermaster sent to Swift & Company a circular proposal requesting it to submit bids for January deliveries. A like proposal was sent on January 7, 1919, requesting bids for February deliveries, notifying Swift & Company in each instance to submit bids only on the "quantities previously awarded it for these months." (R. 44.)

Bids were submitted by Swift & Company and prices agreed upon for the January and February, 1919, deliveries of bacon, and said deliveries were completed on February 11 and March 3, respectively. Three formal contracts bearing date of February 10, 1919, were executed in accordance with Rev. Stats. 3744 by J. C. Shugert, Capt., Q. M. Corps, for the January deliveries, and one formal contract dated February 4, 1919, was similarly executed by the same officer on behalf of the Government for the February deliveries, and all four of the contracts were approved by the Board of Review (R. 44, 45), as provided for in regulations (R. 30).

No proposals for bids for delivery of March, 1919, Army bacon were sent to Swift & Company, no bids were received from said Company for such bacon, and no contracts were entered into therefor, as was done for the January and February, 1919, deliveries. (R. 45.) This Court will take judicial notice of the fact that the Armistice was signed on November 11, 1918, and that the emergency Army was thereafter rapidly demobilized. By letter dated January 24, 1919, General Kniskern, by O. F. Skiles, informed Swift & Company that, due to large quantities of bacon, etc., on hand, and in view of the fact that the Army was being rapidly demobilized, the Depot Quartermaster, whose designation had been theretofore changed to Zone Supply Officer, " will not be in the market "

for any of said products during the month of March. (R. 40.) The letter added:

> 2. Such quantity of bacon as is now in process of cure, over and above the quantity necessary to take care of February awards, and which has been passed by inspectors of this office, will be accepted.
>
> 3. This information is furnished you for the purpose of giving as much advance notice as possible of the intentions of this office, in order that you may take such steps as you may deem necessary toward the reconstruction of your commercial trade.
>
> 4. There is at present no likelihood of any further purchase of the products mentioned for several months.

This notice was received by the claimant on January 27th, the week end having intervened. It had begun on January 13, 1919, to put bacon in cure for March, 1919, delivery, but thereupon ceased to do so. However, it proceeded with the curing, smoking, and canning of that already in cure, notifying its subsidiaries to do the same. This notification was complied with. (R. 41.)

On March 5, 1919, but erroneously under date of February 5, 1919, General Kniskern, by Major Skiles, sent another letter to the claimant advising that an extension of time on deliveries of February bacon had been granted as requested to permit delivery up to March 31, 1919. (R. 41–42.)

He added that none of the commodities in question of the quantities noted beyond February con-

tracts would be required by his office, and that it would be necessary for the claimant to discontinue production immediately on commodities not intended for the February contract. He further advised that if claimant had any issue bacon *in smoke* in excess of the February amount, that would be accepted, but that under no conditions should any more bacon be placed in smoke for his office. (R. 42.)

He further advised that it was the intention of his office to enter into negotiations with the claimant, with a view to making settlement " for such material as you now actually have on hand *which can not be utilized* after completion of the February contract " (italics ours); that no further communication with his office was necessary; and that as soon as possible his office would call for certain information and the negotiations would begin. (R. 42.) He then added, " In the meantime you are *instructed to use every effort* to dispose of such material as you now have on hand, in order that adjustment may be quickly made " (italics ours). (R. 42.) It is to be noted that the Dent Act, 40 Stat. 1272, had become law on March 2, 1919, authorizing the Secretary of War to adjust informal contracts arising prior to November 11, 1918.

The claimant, upon receipt of this notice of March 5th, ceased putting bacon in smoke, but completed the smoking and canning of that already in smoke.

The Army bacon in cure by the claimant for March delivery, which remained unsmoked, was permitted to stay in cure from 78 to 86 days (R. 46), when more than 60 days was undesirable (R. 32, 46).

Swift & Company replied to this letter on March 7, 1919, stating: *" We offer for delivery during March "* certain quantities of bacon located at Chicago, Kansas City, and Boston aggregating 4,130,000 lbs. (R. 45–46), *and the present controversy arises because of the refusal of the United States to accept said offer.* Neither Kniskern, nor any of his assistants, appear to have replied to this letter, and on March 14, 1919, " confirming conversation," Swift & Company, again wrote the Zone Supply Officer stating the same quantities and prices as in its letter of March 7th, and added that the bacon was blocking up its facilities. (R. 46.)

General Kniskern wrote in reply that it was impossible for his office to receive bacon for which purchase orders had not been prepared and that " as soon as agreement is reached as to prices and purchase orders have been prepared, shipping instructions will be furnished." (R. 47.) That is, when the bacon had been actually purchased.

Again, on March 22nd, the claimant wrote to the General Supply Depot, reiterating its statement of March 7th as to quantity of Serial No. 10 bacon and proposed prices. On account of shortage of storage room, it requested purchase orders and

shipping instructions "in the very near future." (R. 47.)

On April 24, 1919, General Kniskern wrote to the claimant, stating that his office was taking steps for an adjustment of material on hand to be applied against March deliveries, "*which allotments were canceled.*" He requested that the claimant's representative be present at his office on April 29, 1919, "in order that you may be fully informed as to what methods shall be followed by your firm in submitting your claims." (R. 47.)

On April 29th, General Kniskern again wrote to the claimant, enclosing papers to be used in the preparation of a claim "for any amount you may consider due from the various packing-house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss by reason of cancellation of those orders." (R. 48.)

On August 29, 1919, General Kniskern again wrote to the claimant (R. 48) with reference to its claim "for the value of bacon prepared by you under allotment given by this office on November 9, 1918," canceled and subsequently allotted by the Food Administration on December 3, 1918. He told the claimant that the Board of Contracts Adjustments in Washington had not taken action; that until the award on this claim has been assigned to his office it would be impossible to give definite instructions "as to the disposal of any of this product which may at this time be in your possession." Because of the perishable nature of the

product and its importance as food, he suggested that it should be disposed of "at the earliest possible moment." He further stated that it would not be possible for the Government to dispose of the bacon until the negotiations were completed and the actual ownership determined by the Government, "taking them at the agreed price or turning them over to you on a basis similar to the salvage basis of unfinished material."

General Kniskern added: "In the judgment of this office, if you are able to dispose of this product by a sale *within the limits of the United States* (italics ours), it would be a perfectly proper proceeding, bearing in mind, of course, that having made such sale it would be necessary for you, when the later negotiations are in progress, to be able to convince the negotiating officer that the price you may have received for such part of this product as has been sold was justified by the conditions." He told the claimant that the Government was then receiving about 34$\frac{7}{16}$¢. per pound for its own surplus bacon, adding that, in his judgment, sales by the claimant at that price would be in the interest of the Government. He suggested, however, that the claimant should endeavor to secure more definite information with reference to the sale from the Office of Director of Purchase and Storage (R. 48); that is, from his superior officer. (R. 30.)

The claimant began in September, 1919, after investigating foreign markets, to sell the bacon in question in the United States at wholesale through

its branch houses and its car-route selling department. At this time other packers were putting on the market bacon of the same character; and so was the Government. (R. 49.)

The claimant obtained one cent per pound less than the Government received for surplus bacon of the same character. The Government later reduced its price on Army bacon; and the claimant's sales followed the Government price, the lowest obtained being 22½¢. per pound. The bulk of the sales of this character were completed in January, 1920, but some were made as late as October, 1920. (R. 49.)

The Court of Claims entered judgment in favor of claimant for $1,077,386.30 (R. 48), made up of debits and credits in an explanatory statement (R. 55), and dismissing the Government's counterclaim.

The Department has concluded that under the rule adopted by this Court it will take judicial notice of orders and regulations issued pursuant to law by heads of Departments (*Caha* v. *U. S.*, 152 U. S. 211; *The Paquette Habana*, 175 U. S. 677; *Ex parte Hitz*, 111 U. S. 766; *Jones* v. *U. S.*, 137 U. S. 214; *Gratiot* v. *U. S.*, 4 How. 80), that it will not be necessary to have the case remanded for further findings of fact on the claim against the Government. It has also concluded to abandon the counterclaim against Swift & Company; that is, that the Government will not press the allowance of the

motion to remand filed in this Court on March 9, 1925, consideration of which was postponed until the hearing on the merits.

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors on which the Government relies may be stated under the following heads:

1. There was no valid contract within the requirements of Rev. Stats. 3744 binding the United States to accept and pay for March, 1919, deliveries of Army bacon, and making it liable in damages for refusal to do so. The Court of Claims erred in holding that such a contract existed.

2. The contract being invalid under statute, the United States was not liable in damages for failure to accept and pay for March, 1919, deliveries of bacon. The Court of Claims erred in holding that acceptance and payment for January and February, 1919, deliveries made the United States liable in damages for refusal to accept and pay for March, 1919, deliveries.

3. If the letters relied upon in finding XVI (R. 36, 39) give rise to any agreement whatever, they constitute three separate and distinct informal contracts for delivery of bacon during the three months of January, February, and March, 1919, and the performance of two of such contracts does not cure the invalidity of the third one. The Court of Claims erred in holding that they constituted a single agreement and that partial performance was

sufficient to charge the United States with damages for breach of the unperformed part.

4. No agreement for delivery of bacon in March, 1919, was executed on behalf of the United States by any duly authorized contracting officer. The Court of Claims erred in holding to the contrary.

5. But if there was an entire agreement within the requirements of Rev. Stat. 3744, executed on behalf of the United States by a duly authorized contracting officer for Army bacon for January, February, and March, 1919, it was abrogated or rescinded by the mutual consent of the parties in submitting proposals and bids and entering into formal contracts for January and February, 1919, deliveries.

6. Even conceding that it was an entire and valid contract, and that same has been breached by the Government, the claimant has failed to minimize its damages by not using due diligence in disposing of the rejected bacon. The Court of Claims applied the wrong measure of damages to the facts disclosed. Application of the correct measure of damages will preclude all recovery.

ARGUMENT

Summary

I

The court below erred in holding that there was ever any valid contract binding the defendant to purchase Army bacon from the claimant for delivery in March, 1919.

II

The court erred in holding that there had ever been either such complete or partial performance of a contract for the sale and delivery of Army bacon in March, 1919, as would render an informal and invalid contract an executed contract within the meaning of the law.

III

The court erred in holding that there was an entire and single contract for the several amounts of Army bacon to be delivered in January, February, and March, 1919.

IV

No agreement for March, 1919, deliveries of Army bacon was executed on behalf of the United States by any duly authorized contracting officer. The Court of Claims erred in holding the contrary.

V

But if there was an entire agreement within the requirements of Rev. Stat. 3744, and executed on behalf of the United States by a duly authorized contracting officer, for Army bacon deliveries for the months of January, February, and March, 1919, it was abrogated or rescinded by the mutual consent of the parties in issuing proposals for bids, submitting bids, and entering into contracts as required by law for the January and February deliveries of bacon.

VI

The court erred in holding that the claimant used due diligence in disposing of Army bacon Serial 10 in the United States and in applying the wrong measure of damages to the facts disclosed.

I

The court below erred in holding that there was ever any valid contract binding the defendant to purchase Army bacon from the claimant for delivery in March, 1919

This cause of action is based upon an alleged express contract for the purchase of Army bacon from the claimant for delivery in March, 1919. The jurisdiction of the Court of Claims was invoked under Section 145 of the Judicial Code. (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1136.)

In substance, the decision of the court below, expressed with some doubt (R. 64, 72), was that a valid and binding contract between the Government and the claimant was created by the letter of November 12, 1918 (R. 36), from the claimant to the General Depot of the Quartermaster Corps at Chicago, and the letter of December 10, 1918 (R. 39), from Brigadier General Kniskern, "by O. W. Menge, 2nd Lieut.," to the claimant. To relieve its doubts, the court further found (R. 73) that under the facts of this case the claimant was entitled to the benefits of full performance, which took the case outside the scope of Rev. Stats. 3744.

The letter of *November 12, 1918,* was a letter from the claimant to the War Department, General Depot of the Quartermaster Corps, Chicago, Illinois, offering certain deliveries of Army bacon, both Serial 10 and Serial 8, in specific quantities for each of the months of January, February,

and March, 1919. Elastic conditions were attached as to the variation in amount of each kind of bacon which it was willing to deliver at a separate price for each of the named months. The price remained undetermined and was to be fixed later by negotiation. (R. 37, supra, p. 8.)

The letter of *December 10, 1918,* was addressed to the claimant and signed by "A. D. Kniskern, Brigadier General, Q. M. Corps, officer in charge, by O. W. Menge, 2nd Lieut. Q. M. Corps." It stated (R. 39):

> In connection with the *offers* you made to this office on bacon, Serial 10, for delivery during the months of January, February, and March you will please find indicated below the schedule of deliveries this office requests you to make. [Italics ours.]

This expression is followed only by the amounts of *Serial 10* Army bacon which had been offered by the claimant in its letter of November 12th. Its offer of Serial 8 is not mentioned. The letter requests information as to where the claimant contemplates putting up the allotments. (R. 39, *supra,* p. 10.)

We assume for the purpose of this argument, but do not concede, that the Government agents who signed the letter of December 10th had proper authority. The question must now be considered whether the two letters constitute a contract binding upon the United States. The offer of the claimant will be first examined.

It will first be noticed that the terms of the offer contained in the letter of November 10, 1918, negative any conclusion that a prior binding contract existed. It is an offer intended for acceptance, and does not indicate any prior acceptance. This fact is shown by its uncertainty as to the quantities of Serial 10 and Serial 8 bacon offered and by its uncertainty as to the proportionate amount of each kind which the Government might accept. It will further be noted that the offer of Serial 8 and Serial 10 bacon is *not* a separate offer of each kind, but is an offer couched in language which shows a *joint* tender of *both* kinds of bacon. The conditions expressed therein, with reference to the varying amounts of Serial 10 and Serial 8 bacon, leave no room for doubt on this point. The letter, it is true, expresses a willingness that the respective quantities of bacon therein tendered may be varied if necessary. But there is no language to show that the claimant was willing to permit the entire extinction of the *offers* as to either one of the two types of bacon. Nor was there expressed any place of delivery or price for the bacon.

The letter of December 10th, which is supposed (by inference only) to constitute an acceptance of these offers, refers only to Serial 10 bacon, and requests information as to the place at which the claimant contemplates putting up such bacon. In this particular, the record is silent as to any response from the claimant.

Under these circumstances, the question necessarily arises whether the letter of December 10th was an acceptance, sufficient on its face and by its terms, to bind the claimant, if the *Government* had undertaken to enforce the contract. In other words, was the acceptance responsive to the offer? It may be argued that the claimant did in fact deliver the quantities mentioned for January and February, 1919, and that it thereby ratified the contract. But this subsequent ratification in no way satisfied the statutory provisions which require, at the very least, that Government contracts shall be reduced to writing and signed by the parties to be charged. A written acceptance by the claimant of the terms contained in General Kniskern's letter of December 10, 1918, would have been necessary, at the very least, to have constituted a "reduction to writing." There can be no doubt that, upon the receipt of General Kniskern's letter of December 10th, the claimant would have had the right to reject his acceptance, on the ground that it was not responsive to the claimant's offer. The claimant had offered certain amounts of both Serial 10 and Serial 8 bacon, subject to variation of quantities. It did not offer either type alone. But General Kniskern undertook to accept only Serial 10, saying nothing of Serial 8, nor anything as to the price but *inquiring* as to the place of delivery.

To sustain the claimant's case, we must accept the absurd conclusion that these two letters form

a contract binding upon the Government, although there is no price mentioned, no place of performance indicated, and no legal liability on the part of the claimant to perform the contract. The United States urges that these letters do not constitute an agreement of any kind.

In *United Press* v. *New York Press Company*, 164 N. Y. 406, Judge Gray said:

> It (the contract) lacked support in one of its essential elements, in the absence of a statement of the price to be paid. That was a defect, which was radical in its nature and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essential a particular, can not be ascertained from the instrument, neither the court, nor the jury, will be allowed to make an engagement for them upon the subject.

Correspondence of this vague character and indefinite effect can not by any construction of law be held sufficient to satisfy the mandatory requirements of the statutes governing the execution of Government contracts.

Where it is contended that a contract is embodied in letters passing between parties, there must be no substantial element of doubt as to what the contract is and whether the parties are bound thereby. Such doubt prevents a contract from arising, even between individuals. To hold that such correspondence binds the Government, in the face of the statutes already quoted, would be to nullify the efforts of Congress in the exercise of what was

deemed a wise public policy to safeguard the public interests. Congress clearly intended to make it absolutely necessary that Government contracts should be executed in a manner whereby certainty of terms and fixed responsibility should be beyond question.

The United States further urges that in any event the letters of November 12 and December 10, 1918, do not constitute a valid contract. Certain acts of Congress prescribe the methods by which the Government may be bound under contracts made by its agents. The first of these is Rev. Stats. 3744, which provides:

> It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof. * * *

This section originated in the Act of June 2, 1862, c. 93 (12 Stat. 411). By the decision of this Court in *South Boston Iron Company* v. *United States,* 118 U. S. 37, the provisions of the earlier Act were held to be mandatory and inescapable.

"It is the final written instrument that the statute contemplates shall be executed and signed by the parties and which shall contain and be the proof of their obligations and rights." *Monroe*

v. *United States,* 184 U. S. 524; *Simpson* v. *United States,* 172 U. S. 379. Mr. Justice White restated in the latter case the rule laid down in *Brawley* v. *United States,* 96 U. S. 168, and said:

> The *written contract merged all previous negotiations,* and is presumed in law to express the final understanding of the parties. (Italics ours.)

The letters of November 12 and December 10, 1918, were merely preliminary negotiations and they were never merged into a written contract and signed by the parties in accordance with Section 3744 of the Revised Statutes, so far as the March bacon was concerned. As stated, such contracts were executed as to the January and February bacon.

The opinion of the Court of Claims also refers to the Act of March 4, 1915, c. 143 (38 Stat. 1078).[1] The regulations made pursuant thereto by the War Department, as contained in Paragraph 724, Manual for The Quartermaster's Corps, are attached to this brief as an appendix (infra, p. 102).

Examination of this Act of 1915 and of the regulations pursuant thereto discloses, first, that the War Department, in promulgating its regula-

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[1] This act provided that thereafter:

* * * Whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster Corps authorized to make them, and are in excess of $500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General. This statute has been construed in *Export Oil Corp.* v. *United States,* 57 Ct. Clms. 519.

tions, regarded the provision of the Act of 1915 to the effect that "such contracts shall be reduced to writing and signed by the contracting parties," as merely a reenactment of the procedure required by Rev. Stats. 3744. The court below regarded the Act of 1915 as of doubtful application to the facts here involved, saying:

> If it affects this case, it is only because it lends countenance to a conclusion that Section 3744 may be complied with without the appending of the signatures of both parties on the same paper at the end thereof. (R. 66.)

It is evident that the Act of 1915 could be of interest here only if it were held that a series of informal letters constituted compliance with its provisions. It is respectfully submitted that the expression "reduced to writing and signed by the parties" connotes more than individual letters. It contemplates the reduction of the contract itself to a formal writing. The point may be illustrated by comparison with the language of the statute under consideration in *Brown* v. *District of Columbia*, 127 U. S. 583. There the statute ran: "all contracts * * * shall be in writing and shall be signed by the parties making the same." Such language as this authorizes the acceptance of *any* written contract as used in the ordinary terms of the law. But the language of the Act of 1915, when taken in connection with the established pub-

lic policy expressed in Rev. Stats. 3744, leaves no room for such latitude of construction.

Reference has been made to Rev. Stats. 3709.[2] Consideration of this section shows that its purpose is to obviate the necessity of public advertising in cases "when immediate delivery or performance is required by the public exigencies." There is nothing in the subsequent part of this statute, where it says "the articles or service required may be procured by open purchase or contract at the place and in the manner in which such articles are usually bought and sold or such services engaged between individuals," which would relieve the purchasing officer from the duty of taking a written contract, pursuant to Rev. Stats. 3744. The purpose of Rev. Stats. 3744 is to provide certainty and responsibility with reference to *all* contracts entered into on behalf of the Government. Its application is not confined alone to contracts which are preceded by advertisement and bidding. Moreover, Rev. Stats. 3709 requires, in the first place, *immediate delivery* of the purchased article required by the public exigency.

[2] All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

It can not be said that a sale of bacon initiated in November, 1918, to be delivered in March, 1919, is a contract for "*immediate delivery,*" even considering the time required for its preparation (not more than sixty days at the most; cf. R. 46). The War Department order of April 12th, 1917, shows that the exigency there declared was to affect *advertising* of contracts only. It was not to affect the form of their execution. (R. 27.) Under no construction placed upon Rev. Stats. 3709, can justification be found for waiver in this case of the provisions of Rev. Stats. 3744. The court below has so held in *Henderson* v. *United States,* 4 Ct. Clms. 75; *Cobb* v. *United States,* 18 Ct. Clms. 514. See also the rulings in 20 Opp. A. G. 496 and 26 Comp. Dec. 592.

The court below held that the Food Administration had "no authority to contract nor can we find any evidence in the record, in connection with its allotment of bacon, of any intention or attempt to contract." (R. 63.) It therefore follows that the acceptance indorsed on the allotment by the claimant (R. 38–39) could not have constituted a written contract of even the most informal character, binding upon the United States.

The fact that statutory provisions as to Government contracts may sometimes operate to bring about apparent hardships, affords no ground for judicial legislation. As this Court has said:

> This argument [based upon hardship] is a dangerous one, and never should be heeded

> where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than to break down the rules of law. [*St. Louis and Iron Mountain Rly.* v. *Taylor,* 210 U. S. 281, 295.]

Acts of Congress of the type now under consideration stand on the same ground of public policy as the Statute of Limitations. The wisdom of the policy which dictates their enactment is not open for examination or construction. Nor can the statutes be evaded by elastic application.

If these two letters, under the conditions shown by this record, are held to constitute a binding contract between the Government and the claimant, a rule of law will be established which is very far beyond the limits of any previous decision, either in this Court or in the Court of Claims. Such a rule would to a very large extent nullify the statutes enacted to prevent just such uncertainty as exists in this case with respect both to the liability of the contractor and to the terms of the contract.

In this case, no applicable statute can be found which dispenses with the requirements of Rev. Stats. 3744. Some effort has, however, been made to create an atmosphere of emergency, which, in some undefined fashion, is argued to be authority for a loose construction of the law.

The claimant has also sought to avail itself of the provisions of the Act of March 2, 1919, c. 94 (40 Stat. 1272), known as the Dent Act.[3]

The letter of November 12, 1918, containing the claimant's offer, was written while the bells of Armistice Day were still echoing as a notice to all that the really great emergency, which had confronted our Government during the War, was substantially lessened, and in the near future would probably disappear. The Dent Act fixed a public policy with reference to contracts made under stress of emergency justifying the removal of the mandatory provisions of the law usually applicable to Government contracts. That Act drew a line at midnight, November 11, 1918, and in effect declared that thereafter no such emergency existed. Conditions were declared to be such that those who dealt with the Government must of necessity be on their guard both as to the statutory form of the contract and as to the authority of those with whom they dealt. No further exemption was allowed from the requirements of Rev. Stat. 3744.

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[1] That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis, that has been entered into, in good faith during the present emergency *and prior to November twelfth, nineteen hundred and eighteen*, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law, * * *.

It is possible, of course, for individuals to establish a " course of business " in the light of which their contracts and their attempts to contract may be construed. But it is respectfully submitted that, in the presence of the mandatory provisions of a statute dealing with Government contracts, it is not within the power of any Government agency, no matter of what importance or high standing, and no matter what its motives, to nullify the exact provisions of the law. The nonobservance of the law renders Government contracts unenforceable.

It is further submitted that no subsequent conduct (short of acceptance of full performance) on the part of a Government agent can change that agent's correspondence into a binding contract. If, at the time of its execution, that correspondence was uncertain in its terms and failed to observe the statutory form, it can not afterwards give rise to a binding obligation.

There is, it is true, further correspondence in the record between the claimant and General Kniskern or Major Skiles, such as the letter of January 24, 1919 (R. 40), the letter of March 5, 1919 (dated in error February 5) (R. 41, *supra,* p. 13), and the letter of August 29, 1919 (R. 48, *supra,* p. 16), which tends to show that these officers regarded the Government as possibly responsible to some extent for damages growing out of its refusal to receive bacon for delivery in March, 1919. However, a careful examination of this correspondence will disclose that in the letter of January

24, 1919, General Kniskern declared that his office *would not be in the market for delivery during March,* except as to the bacon then " in process of cure, over and above the quantity necessary to take care of February awards and which had been passed by inspectors of this office." The record shows no acceptance of this proposal; and no claim is made by the claimant that either this letter or the one of March 5th constituted any part of the contract.

Again on March 5, 1919, under erroneous date of February 5, General Kniskern informed the claimant that none of the bacon beyond that required for the February contracts would be needed. He further declared that it was the intention of his office to enter into negotiations with the claimant " with a view of making settlement for such material as you now actually have on hand *which can not be utilized after completion of the February contract"* (Italics ours). The letter of August 29, 1919, from General Kniskern to the claimant, discusses the claim for the value of bacon prepared, and states that, until the claim should be assigned to his office " for the purpose of conducting negotiations with you as to the manner in which the *informal contracts* shall be adjusted," it would be impossible for him to give any definite instructions as to disposal of the product. The letter then goes on to suggest, as a matter of opinion, what the writer thought might be a proper manner of

disposition, but gives a warning that the disposition must be made in such a fashion as to convince a negotiating officer that any price received was justified by conditions.

It will be noted that it required the passage of the Dent Act to validate such adjustments of irregular contracts even when made during the period of emergency prior to November 12, 1918.

In the letter of August 29, 1918, General Kniskern states, in substance, that until the rights of the respective parties have been determined, the Government can take no steps toward disposing of the bacon. It is respectfully submitted that the subsequent declarations of General Kniskern can not change into a binding contract the letter of November 12, 1918, and the letter of December 10, 1918. It appears, moreover, that even General Kniskern entertained the view that the Government was bound, not by reason of any valid contract in December, but rather by reason of informal invalid contracts. This is shown by the language used in his letter of August 29, 1919, describing the arrangements between the claimant and the United States as "*informal contracts.*" (R. 48.)

We must also consider certain acts of the claimant and of Government officials, taking place subsequent to the two letters claimed to have constituted a valid contract. The record shows that the amounts of Army bacon which were to have been delivered during *January and February,* 1919, were covered by contracts executed pursuant to statute,

namely, by written contracts signed at the end by the parties to be charged, together with the ordinary purchase orders and payment pursuant thereto. (R. 45, *supra*, p. 12.) It is difficult to construe this fact otherwise than as proof that both the Government officials and the claimant recognized that there had previously been no existing valid contracts with reference to the supply of bacon for *January, February, and March.* The execution of contracts in the statutory form was a further recognition of the fact that the statutory requirements had until then been disregarded. At the very least, it must be conceded that both parties realized the substantial doubt as to the existence of any valid contract.

The court below (R. 74) mentions *Seitz* v. *Brewers Refrigerating Company,* 141 U. S. 510, as authority for the doctrine that where written contracts are silent, oral evidence may be introduced to establish certain contractual relations, if it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole transaction between them.

It is submitted that this doctrine has no application to Government contracts, which are required to be reduced to writing and signed by the proper parties at the end thereof. Even if a series of letters be taken to satisfy the statutes, reduction to writing of *all the* essential terms of the contract remains necessary.

Again, the court below (R. 74) cites Williston on Contracts (§§ 652, 660) to the effect that custom and usage are admissible to construe written contracts in matters with respect to which they are silent. It is further stated that " a habit of business confined to the two parties to the contract may by implication be adopted as an express part of it." This doctrine is applied with reference to the lack of a fixed price in the agreements now under consideration. (R. 74.)

Again it is submitted that no custom of business adopted between a contracting Government official and a vendor can be made use of to supply any of the *essential parts* of an alleged contract, which the statute requires to be reduced to writing and signed by the parties.

Examination of this Court's decisions discloses none which tend in the least to destroy or limit the protection which was intended to be afforded the Government in the making of purchase contracts.

In the early case of *Clark* v. *United States*, 95 U. S. 539, 541, this Court held that the provisions of the Act of June 2, 1862, c. 93 (12 Stat. 411) (now incorporated in Rev. Stats. 3744), were mandatory. The Court there said (at p. 541):

> * * * The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to

any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with any officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.

It is true that this language refers to the reduction of the oral contract to writing. It is silent as

to the further requirement that the written contract must be "signed at the end thereof." But it is evident that where no written contract of any kind existed, it was unnecessary for this Court to discuss the question of signatures. However, the Court did say:

> We are of the opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute *until it passes from the observation and control of the party* who enters into it. [Italics ours.]

This fixes a limitation as to what parts of the statute are mandatory, namely, those parts which operate up to and including actual execution and delivery of the contract.

In *South Boston Iron Company* v. *United States*, 118 U. S. 37, 42, this Court, reaffirming the doctrine of the *Clark case*, held that, to bind the United States, contracts by the Navy Department must be in writing and signed by the contracting parties, as required by Rev. Stat. 3744–3747. It is true that the Court did not expressly hold that the contract must be an entire one and signed at the end by the parties. But here again such a decision was not necessary under the facts of the case.

Those facts were that the President of the Iron Company wrote to the Navy Department, offering to build certain boilers for the Navy from drawings and specifications to be furnished by the Navy Department, at a stipulated price per pound. A

memorandum endorsed on the offer shows that it was accepted by verbal direction of the Secretary of the Navy, and that subsequently the Chief of the Bureau involved wrote to the President of the Iron Company stating that, by direction of the Secretary of the Navy, his prior offer was accepted, "upon the terms and conditions named in said letter." Similar correspondence took place between the Iron Company and the Navy Department relative to further boilers required. This last correspondence was dated about March 10th. No specifications or plans were submitted by the Department; and on March 16th the Department advised the Iron Company to discontinue all work previously contracted for, until further directed by the Secretary of the Navy. The Court of Claims held that Rev. Stats. 3744 required all contracts "to be reduced to writing and signed by the contracting parties with their names at the end thereof," that this provision was mandatory, and that contracts which did not comply with it were void. The Supreme Court held that the letters constituted only preliminary negotiations and not an enforceable contract within the meaning of the law. It is apparent that the silence of this Court on the question of signatures at the end of the contract was not the result of a deliberate decision to that effect. In the view taken of the case, no decision on this point was necessary.

Brown v. *District of Columbia,* 127 U. S. 579, involved an alleged paving contract with the District

of Columbia. Section 37 of the Act of February 21, 1871, c. 62 (16 Stat. 427), provided that "All contracts made by said Board of Public Works *shall be in writing* and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District." The claim was made that a formal proposal in writing accepted by the duly authorized Secretary of the Board, whose signature was not denied, was a valid contract binding upon both parties. This Court referred to numerous authorities to show that " a written acceptance by one party of a written proposal made to him by another party created a contract of the same force and effect as if the formal articles of agreement had been written out and signed by said parties," and then stated that the legal principle asserted was sound. However, the real finding of the Court was, in the end, that the Board had never authorized the transaction and that the contract was for this reason invalid.

The language used in Rev. Stats. 3744 (and the construction placed upon that language by this Court), can be clearly distinguished from the language used in Section 37 of the Act of February 21, 1871. Rev. Stats 3744 clearly requires the execution of a formal contract, *signed at the end by the parties.* The Act of 1871 requires only that the contract shall be *in writing.* Its broad language is evidently intended to require only written evidence of the contract.

In *St. Louis Hay & Grain Company v.* United *States,* 191 U. S. 159, it was held that when a void but not illegal contract of sale has been performed on both sides, the vendor can not recover on a *quantum valebat,* less the amount already paid.

The facts were that the contract for the sale and delivery of certain hay to the United States was not in writing; and that the oral contract, according to the construction placed upon it by the claimant, required the Government to take the hay in certain daily amounts. It was contended that this provision was violated by the Government. It was also contended that the Government had failed to take a certain part of the total amount of nine million pounds for which it had contracted.

The Court of Claims held that the contract, not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," could not have been sued upon if it had not been performed, citing the *Clark case* and the *South Boston Iron Company case, supra.*

This Court held that the contract as such was invalid and void; but that the invalidity of the contract was immaterial if it had been performed. The Court added:

> * * * But there was nothing which the law could recognize as duress, and the suggestion that it was peculiarly the duty of the officers of the Government to see that the contract was put in binding form, is very far from making out an analogy to

> fraud. The claimant was bound to know the law at its peril. The agent of the United States made no representation, and the claimant in no way purported to submit its judgment to him, *if that would have bettered its case.* [Italics ours.]

In *United States* v. *Andrews & Company,* 207 U. S. 229, the "contract" consisted of a circular letter from the War Department to the claimant requesting that it furnish certain printed supplies, to which the claimant by letter responded that it would furnish those supplies at the prices asked by the Government Printing Office, plus freight to Manila, where the supplies were to be used. The War Department later wrote to the vendor to deliver the supplies to certain steamship agents at the Pennsylvania Docks in Jersey City. This delivery was made by the vendor. The goods were injured in transit; and upon their arrival in Manila, the Government refused to accept them.

It was urged by the Government that the contract, consisting of the letters just mentioned, did no comply with the requirements of Rev. Stats. 3744, since it was not "reduced to writing and signed by the contracting parties with their names at the end thereof." This Court held, not that the correspondence constituted a compliance with the provisions of Rev. Stats. 3744, but that the contract had become executed when the vendor delivered the goods to the carrier designated by the Government. In other words, complete execution

of the void contract took it beyond the provisions of Rev. Stats. 3744.

In *United States* v. *New York and Porto Rico Steamship Company,* 239 U. S. 88, the contract consisted of a written request by the Government that the Steamship Company make a tender for the transportation of coal, and a written offer of the Steamship Company so to do. This offer was accepted by telegraph on the same day. The Steamship Company afterwards wrote to acknowledge the telegram, and advised that it would in due course indicate what steamers it would tender. There was further correspondence on the basis of a mutual contract. When the Steamship Company failed to furnish the agreed transportation, the Government sued for breach of the contract. The defendant set up that the contract did not comply with the provisions of Rev. Stats. 3744.

The decision of this Court discusses the origin of Rev. Stats. 3744, derived from the Act of June 2, 1862, c. 93 (12 Stat 411), and refers to the *Clark case.* The Court then says:

> * * * and *while it is established that a contract not complying with the statute can not be enforced against the government,* it never has been decided that such a contract can not be enforced against the other party. The prevailing opinion can not be taken to signify that the informal contract is illegal, since it went on to permit a recovery upon a *quantum valebat*

when the undertaking had been performed by a claimant against the United States. *United States* v. *Andrews,* 207 U. S. 229, 243, 52 L. ed. 185, 191, 28 Sup. Ct. Rep. 100. Of course the statute does not mean that its maker, the government, one of the ostensible parties, is guilty of unlawful conduct, or that the other party is committing a wrong in making preliminary arrangements, if later the Secretary of the Navy does not do what the act makes it his duty to do.

There is no principle of mutuality applicable to a case like this, any more than there necessarily is in a statute requiring a writing signed by the party sought to be charged. The United States needs the protection of publicity, form, regularity of returns and affidavit (Rev. Stat., sections 3709, 3718–3724, 3745–3747; Comp. Stat. 1913, sections 6832, 6862, 6863, 6865, 6869, 6872–6874, 6897–6899) in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him. We see no reason for extending the implication of the act beyond the evil that it seeks to prevent. Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, "void" being held to mean only voidable at the party's choice. [Italics ours.]

American Smelting Company v. *United States*, 259 U. S. 75, involved these facts. A smelting company had agreed, by a series of letters with the Government, to deliver a large quantity of copper at a stated price, with the view of executing a formal contract. This formal contract was later executed, although under protest by the smelting company. There was some delay on the part of the Government in issuing shipping orders for a part of the copper, but all was finally delivered. Between the date of the contract and the final delivery the price, fixed under Government control, had advanced from 23½¢ per pound to 26¢. The Smelting Company claimed the right to receive the later price, first, on the ground that it had acted under compulsion of law in entering into the contract. This Court held there was no such compulsion. Secondly, the Smelting Company contended that there had been no advertisement of the bids, as provided by Rev. Stats. 3709. This Court said that the emergencies of war then existing justified the omission of publication of bids, and, furthermore, that Rev. Stats. 3709 was solely for the protection of the Government. Its provisions were not available to the plaintiff. On this point the Court cited *United States* v. *New York & Porto Rico Steamship Company, supra.* It will be recalled that the *New York & Porto Rico S. S. Co.* case involved the application of Rev. Stats. 3744. The Court further held that the plaintiff must stand upon the letters in question as to the terms of its contract.

It is apparent that the judgment of this Court was as follows: Under the circumstances of the case there was no compulsory seizure. The deliveries were in pursuance of a contract which, although voidable at the option of the Government, was binding upon the plaintiff. This contract had been executed as to all of its terms, except possibly as to some delay in receipt on the part of the Government. The matter of the delay sounded in damages for breach of contract, if any claim could be made; but such a claim was not before the Court at that time. The Court further found that the provisions of the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) did not apply to the case. Where an agreement, entered into by letters, has been later embodied in a formal contract, although under protest, and delivery and acceptance have been fully performed, there is no ground for the application of the Dent Act so as to increase the purchase price fixed by the letters which indicated the agreement of the parties.

It is further apparent that the provision of the Dent Act as to settlement of irregular contracts "upon a fair and equitable basis" was not designed to increase the contract price in performed contracts, but was designed to protect the Government in such settlements.

In the case at bar, the Court of Claims apparently was of the opinion (R. 66) that *American Smelting Co.* v. *United States* was authority for the proposition that a contract between the Govern-

ment and a vendor, consisting of a series of letters, satisfied the provisions of Rev. Stats. 3744. This opinion of the Court of Claims was based upon the final paragraph in the opinion of this Court in the *Smelting Company* case. That paragraph in substance stated that this Court had not deemed it necessary to deal with evidence showing repeated requests that the " claimant should sign a formal contract, its refusal, and its ultimate signing, under protest, *because these facts in no way modified the relation of the parties under the contract by letters already made.*" (259 U. S. 75, 79.)

Consideration of the whole opinion in relation to this last paragraph shows that no such conclusion as to the satisfaction of Rev. Stats. 3744 is justified. In the last paragraph, this Court said only that the letters constituted the agreement of the parties, as subsequently embodied in a formal contract; that the contract had been executed; that the Government sought no avoidance of the contract, under Rev. Stats. 3744; and that therefore the application of Rev. Stats. 3744 need not be considered. There was certainly no finding that in an unperformed contract, or in one only partially performed, the Government could not avoid the contract if it were not executed in the manner prescribed by law. The Court had already decided that Rev. Stats. 3709, as to advertising of bids, was solely for the protection of the Government, and was not available to the plaintiff. For this, the Court cited the *New York & Porto Rico Steamship Co. case* in which it

had held that *Rev. Stats. 3744 was likewise solely for the protection of the Government.*

It can not therefore be argued that the *Smelting Company* case is authority for the proposition that the Government must necessarily be bound by a contract not complying with law as to form and execution, or as to so much of that contract as remains unperformed, by reason of nonacceptance of delivery. *Clark* v. *United States,* 95 U. S. 539, 542.

Erie Coal & Coke Corporation v. *United States,* 266 U. S. 518, 521, is a very recent expression of this Court giving effect to Rev. Stats. 3744. In that case, the Secretary of War, acting under permissive legislation, advertised approximately 40,000 tons of nitrate of sodium for sale at public auction in Washington. The advertisement stated (1) that bidders would be required to make deposit of 10% of the purchase price; (2) that acceptance of any bid would not be final until the execution of a contract and a bond, which should provide that (3) the Government " at its election may rescind said sale any time before August 1, 1922 * * *."

The claimant was the highest bidder. The nitrates were knocked down to it by the auctioneer, and it deposited more than 10% of the price. The claimant then demanded that the Secretary of War execute a contract of sale. This the Secretary refused to do, on the ground that the price offered was inadequate. Suit was then brought for the excess of the market price over the total of the claimant's bid.

This Court held that there could be no recovery under the terms of sale. Had the contemplated contract been issued, the situation would not have been altered, since under it the United States would have had the right to rescind.

Concluding, Mr. Justice Butler said:

> Moreover, section 3744, Revised Statutes, required the Secretary of War to cause every contract made by him, or by officers under him appointed to make contracts, "to be reduced to writing and signed by the contracting parties with their names at the end thereof." The Act of July 11, 1919, authorizing the Secretary to sell surplus war supplies, is not inconsistent with that section and does not repeal or modify it. There is no reason why it should not apply to contracts made in pursuance of the later act. It must be held that, because of the failure to make and sign a written contract as required by section 3744, the United States was not bound. *Clark* v. *United States*, 95 U. S. 539, 541; *South Boston Iron Co.* v. *United States*, 118 U. S. 37, 42; *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159, 163. And see *Monroe* v. *United States*, 184 U. S. 524, 527; *United States* v. *New York & Porto Rico Steamship Co.*, 239 U. S. 88, 92; *Ackerlind v. United States*, 240 U. S. 531, 534.

Examination of all the above cases, decided by this Court, must lead to the conclusion that the provisions of Rev. Stats. 3744 are mandatory; that only fully executed contracts escape the applica-

tion of its requirements; and that informal letters are held to constitute a contract voidable at the option of the Government.

Accordingly it is submitted, on the authority of Rev. Stats. 3744, as construed by this Court, that the court below erred in holding that the agreement for the delivery of Army bacon in March, 1919, was in any way binding upon the United States.

II

The court erred in holding that there had ever been either such complete or partial performance of a contract for the sale and delivery of Army bacon in March, 1919, as would render an informal and invalid contract an executed contract within the meaning of the law

The court below considered that any doubt as to the existence of a valid contract in this case was cured by performance. It held that the claimant had done such acts as entitled it to a finding of full performance in relation to an alleged *entire* contract for the sale of Army bacon for delivery in *January, February, and March,* 1919 (R. 70).

This conclusion of law is largely based, first, upon a further conclusion of law that there was an *entire* contract for the sale of bacon to the Government for delivery in *January, February, and March,* and second, upon findings of fact to the following effect:

(*a*) The claimant had made deliveries for the months of *January and February,* 1919;

(*b*) The claimant had purchased on the market hogs suitable to manufacture the bacon in question, had butchered large quantities of them, and had devoted that part suitable for the purpose to the manufacture of Army bacon, along with its commercial business of like character. It had received notice that the Government would not be in the market or require bacon in excess of the amount necessary for the *February* delivery. This notice was contained in the letter of January 24, 1919 (R. 40–41), and in the letter of March 5, 1919 (R. 41), if, indeed, it was not implied by the proposals in December and early January for bids for January and February deliveries of bacon (R. 44). At R. 45 appear the specific amounts claimed to have been cured and smoked, or to have been put in cure before notice was received. These facts indicate that on March 5, 1919, the claimant had manufactured, smoked, and canned Army bacon to the amount of over 4,000,000 pounds and had in cure bellies for Army bacon to the amount of more than 1,000,000 pounds;

(*c*) The complete manufacture and preparation of the 6,000,000 pounds of bacon for the *March* delivery was prevented by receipt of the notices of January 24th and March 5, 1919.

Before reaching a conclusion on the facts stated, it will be well to note that in the alleged acceptance by General Kniskern on December 10, 1918 (R. 39), this phrase appears, " In connection with the *offers*

on bacon, serial 10, for delivery during the months of January, February, and March." There follows *a segregation of bacon into specific monthly deliveries.* There is no purchase of a *gross amount divided into equal monthly deliveries.* The price was left unascertained and was subsequently fixed upon each month's delivery as a matter of separate negotiation for each month. Separate proposals, bids and formal purchase contracts and purchase orders were issued for the January and February deliveries and separate payment made therefor. Only on January 13, 1919 (R. 40), were the first bellies put in cure for the March delivery after the proposals and bids for the January and February deliveries. A formal purchase order was issued to the claimant for the January deliveries on January 4th (although subsequently canceled, and another issued under date of February 10, 1919). The whole procedure (R. 44) was sufficient to put the claimant on notice as early as December 19, 1918, of a change in the methods of purchase authorized and used by the Quartermaster's Department. (R. 44.) Yet the claimant, with this knowledge in its possession, *on January 13th* began to prepare for a delivery of bacon in March for which no proposals had been issued or bids submitted.

The agreement, being a contract of purchase and sale, can not be said to have been fully performed, where the March delivery was never made, although this delivery was in all probability prevented by

notice that the Government was not in the market. Such preparation as had been made by the claimant to execute the March delivery was neither performance nor part performance of a purchase and sale contract.

The only part performance which may by possibility be considered, is the performance of the deliveries for *January and February*. This, the claimant argues, was sufficient to take the agreement for *March* delivery outside the requirements of Rev. Stats. 3744.

The court below held that under all the circumstances the claimant was entitled to the benefits of full performance. (R. 73.) At the same point in its opinion the court concluded that the same result might be reached by another line of reasoning, as follows. When on January 24, 1919, the claimant was notified that the Government would not be in the market for March bacon, it was further notified that the Government would accept such bacon as was already in cure, above what was necessary to complete February deliveries, and had been inspected. This was evidently not a performance of a binding contract, but was merely a concession to peculiar conditions. The court further calls attention to the notice of March 5th, erroneously dated February 5, 1919, where the Government further stated that it would accept certain quantities of smoked bacon; and the court finds that the claimant, according to those instructions, ceased

to produce. Neither of these two notices can be held a sufficient compliance with Rev. Stats. 3744. At the most, these notices can only be used by the claimant as a reason for nonperformance of a contract which, if invalid, was voidable at the option of the Government, and if valid, must find validity in the letters of November 12, 1918, and December 10, 1918.

Action by a Government official, which brings about *cessation* of the preparatory measures necessary to produce goods alleged to have been sold to the Government can not validate the contract of sale if it does not comply with Rev. Stats. 3744. The subsequent interference of the agent creates no cause of action against the Government. *Export Oil Corporation* v. *United States,* 57 Ct. Claims 519. And it was for this very reason that the Dent Act of March 2, 1919, 40 Stat. 1272, was enacted to settle informal contracts entered into prior to November 12, 1918. See H. R. Rep. No. 877, 65th Cong., 3d sess.

With reference to the performance of the agreement for March delivery, the court below took the view that the agreement was an *entire* contract as to deliveries for January, February, and March. The facts disclosed by the record are that from the very first the parties contemplated *separate deliveries for the several months in varying quantities, at prices for each month's delivery to be settled later by separate negotiations.* The price and place of performance for each month was a matter of

subsequent negotiation. In the end, separate proposals, separate acceptances, separate formal contracts, and separate payments, were made in connection with the January and February deliveries.

In face of all these facts, it is difficult to see how these distinct agreements can be called an *entire* contract. The three chief factors in a sales contract are the amount of goods sold, the place of performance, and the price. In the case at bar, the last two factors were left undetermined for separate settlement as to each month's delivery. The letters relied upon to show the first factor do not agree with reference thereto. The record is very clear that the parties, in the actual performance of the contracts, so far as delivery was concerned, treated them as separate contracts. The original proposal by the claimant in the letter of November 12, 1918, made an offer of total quantities of Serial 10 and of Serial 8 bacon, providing for delivery of each in varying amounts throughout the three months in question. The letter from the Quartermaster Depot in Chicago, indicating the amounts of Serial 10 to be delivered, segregated the order into *three different amounts to be delivered in each of the months involved.*

Full performance as well as formal execution of the contracts for January and February, under the cases cited in Point I, placed those transactions beyond the scope of Rev. Stats. 3744. But it can not be said there had been any performance by delivery of the March contract sufficient to exclud-

that agreement from the application of Rev. Stats. 3744.

Clark v. *United States, supra* (at page 542), shows that Rev. Stats. 3744 is not rendered inapplicable, in the consideration of an invalid contract, merely because a part of the contract has been performed, or because the claimant can recover, as to that part, on a *quantum meruit*. In the *Clark case*, a vessel leased under an invalid contract was under Government control and in Government service for eight days, and then was lost by misadventure. The oral contract provided that in the event of such loss the Government should pay for the vessel. The Court held that the contract was invalid, and that the Government had possession of the vessel under an implied contract which created only a simple bailment for hire, and that as to the remaining provisions of the void oral contract the Government was not liable. In other words, recovery was allowed on a *quantum meruit* for the actual benefits conferred on the United States.

Applying this principle to the case at bar, it is evident that even if the agreement here involved is held to be an *entire* contract, still the deliveries for *January* and *February* did not validate that part of the invalid contract which remained unperformed—the part, namely, which provided for *March* deliveries. As to those parts of the invalid contract which were performed and as to which the Government has received benefit, namely, the Janu-

ary and February deliveries, the claimant has been compensated in full.

There is no doctrine of law which holds that under the provisions of a void contract of sale to the Government, a vendor is entitled to claim full performance by reason of making preparations to purchase or produce the articles to be delivered to the Government, when the contract, before full performance, is rejected by the Government.

This Court held in *Dusenberg Motors Corp.* v. *United States,* 260 U. S. 115, that even where a contract had been entered into in accordance with Section 3744, Revised Statutes, and had been later canceled, the contractor can not recover such preliminary outlays. It was there said:

> But it (the contractor) took that chance and has not now a legal claim against the Government for reimbursement of its outlays. We need not distinguish between the outlays nor dwell upon them. They were outlays of the speculation, and subject to sacrifice and loss with its disappointment (p. 124).

A fortiori such outlays in whatever form can not be recovered where, as here, there was no formal contract executed in accordance with the imperative provisions of Rev. Stats. 3744.

Accordingly, it is respectfully submitted that the Court of Claims erred in holding that the contracts here in issue were rendered valid and binding by "full performance" as to the bacon which was not delivered on the March allotment.

III

The court Erred in Holding That There Was an Entire and Single Contract for the Several Amounts of Army Bacon to Be Delivered in January, February, and March, 1919

This assignment of error, as a matter of necessity, has been partly considered above, under Point II. It is only desired to add a reference to the opinion of the court below, at R. 72:

> Any separation of the month of March and its treatment as a matter of independent negotiation is, therefore, unauthorized.

This statement, we submit, is not justified by record, especially since two necessary elements of the contract, namely, the place of performance and the price to be agreed upon, were the subject of separate negotiations and separate settlement in each month's contract. The only element that can be held certain under the terms of the alleged offer and acceptance was that a definite amount of bacon of a specified kind would be delivered in each month.

Before preparations were begun for the production of March bacon, the claimant was given notice that separate proposals, separate orders of purchase, and separate formal contracts were to be used for the several monthly deliveries. (R. 44.) This procedure was followed in the January and February deliveries. If those separate formal contracts are to be given any effect whatsoever it fol-

lows that the proposed delivery in March would have been in turn the subject of a separate contract. With all the differences between the actual contracts under which the several deliveries were to be made, the finding of an entire contract for the three months' deliveries cannot be supported.

IV

No agreement for March, 1919, deliveries of Army bacon was executed on behalf of the United States by any duly authorized contracting officer—the Court of Claims erred in holding the contrary

Mention already has been made of the letters of November 12, 1918, and December 10, 1918 (R–36, 37, 39), relied upon by the Court of Claims as constituting a contract for March, 1919, bacon. Attention has also been invited to the manner in which the two letters are, respectively, signed. The letter of December 10, 1918, is signed "By Authority of the Director of Purchase and Storage. A. D. Kniskern, Brigadier General, Q. M. Corps, Officer in Charge. By O. W. Menge, 2nd Lieut., Q. M. Corps." (R–39.)

The question is whether either of these officers had been authorized to contract on behalf of the United States; for lack of contracting authority in an officer pretending to represent the Government precludes the imposition of any liability on the United States, even under the Dent Act of March 2, 1919. *Baltimore & Ohio Railroad* v. *United States,* 261 U. S. 592.

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The Secretary of War is, of course, the administrative head of the War Department. By Rev. Stat. 3744, it is made his duty to cause and require every contract made by him on behalf of the Government, *or by officers under him appointed to make such contracts,* " to be reduced to writing and signed by the contracting parties with their names at the end thereof." Rev. Stat. 3747, which was also a part of the original act of June 2, 1862 (12 Stat. 411), provides that: " It shall be the duty of the Secretary of War " to furnish every officer appointed by him with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also with forms printed in blank of contracts to be made.

It is necessary at this point to refer to certain general orders of the Secretary of War and of the Quartermaster General, which the court below did not incorporate into its findings, but of which this Court will take judicial notice in accordance with the rule announced in many cases (*supra,* p. 18).

As hereinbefore stated, these general orders and regulations have been attached to this brief as an appendix (pp. 97–120).

The first regulation, in point of time, is paragraph 942, Manual for the Quartermaster Corps, 1916, which provides:

> Contracts will be made in the name of, and will be signed by, the officer designated by

> the chief of bureau to which the contracts pertain. They *will not be made at posts unless ordered by superior authority,* and they will not be so ordered unless the stores or services required, of proper quality or kind, can be procured as cheaply there as elsewhere.

This regulation was in force when we entered the World War, and the court below found as a fact that "the regular method of * * * letting contracts to the lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917, and during 1918, the needs had so grown * * * that this method became impracticable" and resort was had to other purchase and procurement methods. (R. 31.)

The Court is reminded at this point that the Act of June 2, 1862, from which sections 3744 and 3747 were carried into the Revised Statutes, was enacted during the dark days of the Civil War, when the enemy was almost at the gates of the Capital, and for the purpose stated in *Clark* v. *United States,* 95 U. S. 539 (*supra* pp. 38, 39). The impracticability of complying with the sections during the World War would appear to be no greater than during the Civil War. In any event, war does not suspend the operation of the law, *Ex parte Milligan,* 4 Wall. 2. Moreover, no provision was made for waiving the requirements of said sections during war, as was done as to Rev. Stat. 3709, nor does the court find that either the President or the Secretary of War attempted to waive said requirements.

On the contrary, the Secretary of War, in compliance with the duty laid upon him by Rev. Stats. 3744 and 3747 (Appendix, p. 97), republished in General Order No. 47, dated May 11, 1918, Rev. Stats. 3744 to 3747, inclusive, for the information of all concerned and added:

> Numerous failures on the part of contracting officers of the War Department to comply with the provisions of these statutes have been brought to the attention of the department. The chiefs of the several supply bureaus will insure a precise and immediate compliance with these statutes. All contracting officers of the War Department will familiarize themselves with these statutes and comply accurately with their provisions.

Again, by General Order No. 55, dated June 10, 1918 (Appendix, p. 99), the Secretary of War amended General Order No. 47 to read as follows:

> No contract will be signed by an officer whose name does not appear in the body of the contract as the contracting officer. Contracts will be made in the name of, and will be signed by, the officers designated by the chief of the bureaus to which the contracts pertain, such appointments to be effective only after announcement of the names, rank, and contracting authorities of such officers by the chief of the bureau concerned. Any officer so appointed shall be designated in the contract itself as the contracting officer and shall make and per-

> sonally sign contracts in his own name. This shall be strictly complied with. Paragraph 563, Army Regulations, requires that the officer signing the contract shall be the person who makes the affidavit of disinterestedness, and this paragraph shall be strictly complied with.

The court below does not refer to paragraph 942, Manual of the Quartermaster Corps, nor to either of General Orders, Nos. 47 or 55. It does refer to office order No. 491, Quartermaster General's office, dated July 3, 1918, as establishing a branch of the subsistence division in Chicago under the immediate direction and control of the depot quartermaster (R. 29) who was General Kniskern (R. 27), and seemed to conclude, on the basis of said order 491 and the general duties of General Kniskern that he was a contracting officer (R. 57 to 59). A copy of Order 491 is printed as an appendix (pp. 100–102), to tnis brief. *It will be noted that nowhere therein was General Kniskern appointed and designated with name, rank, and contracting authority as required by the prior General Order No. 55, of the Secretary of War.* It requires no argument to demonstrate that the Quartermaster General's order 491 could not overrule the Secretary of War's General Orders, Nos. 47 and 55, and a comparison of their terms show that there was no attempt to do so.

The truth seems to be that General Kniskern's duties were administrative and supervisory in character and that he had been at no time *appointed*

with name, rank, and contracting authority, in accordance with General Order No. 55, by either the Secretary of War or the Quartermaster General. Support for this view is found in Notice 179 of the Quartermaster General dated October 3, 1918, appointing Captain Shugert as contracting officer for the Chicago Supply Depot. A copy of this order is also printed in the appendix of this brief (pp. 103–115). Shugert had been appointed on September 17, 1918, as contracting officer for the packing house products and produce division of the office of the Depot Quartermaster at Chicago (R. 31). Purchase and Storage notice No. 109, dated December 2, 1918, which is also printed in the appendix to this brief (pp. 115–120), appointed Captain Shugert as contracting officer for the Chicago Supply Depot for Army subsistence, which included Army bacon. It is to be noted at this point that on November 7, 1918, the entire purchase, storage, and traffic divisions of the Quartermaster General's office had been reorganized into the office of the Director of Purchase and Storage. (R. 28.) The change in Captain Shugert's designation appears to have been made in conformity with the reorganizations effected in Washington. (R. 29, finding VI.) What is more, Captain Shugert actually signed the three contracts for the January and the one contract for the February, 1919, deliveries of bacon (R. 45); but no contract was signed by anyone for March, 1919, bacon (R. 45), unless the letter of December 10, 1918 (R. 39), constituted such a contract

when considered in connection with Swift & Co.'s letter of November 12, 1918 (R. 36–37).

If, as suggested in the opinion below, Capt. Shugert's original designation as contracting officer operated only in a division of the Depot Quartermaster's Office which was separate from the division having jurisdiction over the purchases here involved, then it would necessarily follow that upon his transfer into a supposedly different division to which his former appointment did not apply, Capt. Shugert would have had no authority as a contracting officer.

At R. 30, after referring to numerous circulars providing an authoritative procedure in the purchase of supplies generally, the Court of Claims found that meat supplies were *not* specifically excepted from the provisions of these circulars, but that the necessities of the war period precluded their application.

It is evident that this finding cannot, and is not intended to, apply to the order of September 17, 1918, appointing Capt. Shugert as contracting officer, for the reason that his appointment in express terms made him contracting officer for the *packing-house products and produce division* of the Depot Quartermaster at Chicago.

Further, in the opinion below (R. 59–60), there is a discussion of the facts involved; and a distinction is made between the "*packing-house products branch of the subsistence division of the Quartermaster General's Office,*" created July 3, 1918,

and the "*packing-house products and produce division of the Office of the Depot Quartermaster at Chicago.*" It was to the latter that Capt. Shugert was in formal terms assigned by the order of September 17, 1918.

The claimant further contends that the packing-house products and produce division of the Office of the Depot Quartermaster at Chicago became subservient to the branch created July 3, 1918. But Capt. Shugert's appointment as contracting officer was subsequent to July 3, 1918, namely September 17, 1918. Now, if the packing-house products and produce division, to which Capt. Shugert was assigned by formal order of subsequent date, did not purchase or have anything to do with the purchase of packing-house products, why did the War Department issue a futile order appointing him *contracting officer* in that division, at the same time leaving the packing-house products branch, subsistence division, which is supposed to have charge of such purchases, without a contracting officer? Also the findings make no reference to the orders of ~~September~~ December 2, 1918, and October 3, 1918. (*Supra*, p. 66.)

The facts will not permit the Government's contention to be disposed of upon the theory that the War Department intended to appoint a *contracting officer to purchase packing-house products in a division which had no authority to make such purchases.* The Government's position is confirmed when it is also remembered that when legal methods

of purchase were resumed by the Depot Quartermaster at Chicago, in the execution of formal contracts for January and February, 1919, *Capt. Shugert* (and *not* General Kniskern) executed those contracts, describing himself therein as *the contracting officer.*

On this state of facts, the most logical conclusion is that the Quartermaster's Depot disregarded the prescribed procedure in making contracts with this claimant for packing-house products, at least from September 17, 1918, until the consummation of negotiations leading up to the purchase and delivery of the January and February orders. But such a course of conduct will not suffice to create a binding contract out of informal letters (such as those of November 12th and December 10th, 1918), signed, formally by General Kniskern, but as a matter of fact by " O. W. Menge, 2nd Lieut., Q. M. C.," who by no course of reasoning can be considered a contracting officer. (R. 39.)

It is submitted that, even on this record, deficient as it is in fundamental findings of fact, but supplemented by the general orders and regulations herein referred to, which the Court may notice judicially, the evidence clearly shows that Capt. Shugert, and not General Kniskern, was the properly authorized contracting officer at Chicago from September 17, 1918, and thereafter throughout all the period here involved.

In *Hume* v. *United States,* 132 U. S. 406, 414, this Court said:

> In order to guard the public against losses and injuries arising from the fraud or mis-

> take or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. *Whiteside* v. *United States*, 93 U. S. 247, 257; *United States* v. *Barlow, ante*, 271.

In *United States* v. *Martin*, 26 Fed. Cas. No. 15, 732, it is said:

> The Government is not bound by the representations of its agent, except when it clearly appears that he was acting within the scope of his authority.

In *Hawkins* v. *United States*, 96 U. S. 691, it is said:

> Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity; and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

See also *St. Louis Hay, etc., Company* v. *United States, supra*, where this Court said (191 U. S. 164):

> The claimant was bound to know the law at its peril.

The law applicable to the exercise of authority by Government agents is too elementary and too thoroughly established to require extended citation before this Court.

On these principles, it is evident that no representations made by Government officials connected with either the office of the Depot Quartermaster at Chicago or the Chicago office of the packing-house-products branch of the subsistence division of the Quartermaster General's office, *other than Capt. Shugert,* as to their powers to purchase or to enter into contracts, formal or informal, can be binding on the Government. Nor can the claimant now be heard to say that it was ignorant as to the powers and duties of the Government agencies with whom it had dealt.

However, the defendant is not required to demonstrate that Shugert was the only duly appointed contracting officer for Army bacon on duty at Chicago in the zone supply office or the packing-house products branch of the subsistence division of the office of the Director of Purchase and Storage. (R. 28, 29.) It is sufficient to show that neither Kniskern nor Menge had been so appointed. *The court makes no finding with respect to Menge, who actually signed the letter of December 10, 1918.* (R. 39.) The only finding it made with respect to the contracting authority of Kniskern appears to be in Findings IV, V, and VI (R. 27, 28) and, as stated, the court seems to have concluded that his contracting authority was derived from office order No. 491, and his duties in charge of the Quartermaster Depot and the packing house products branch of the Quartermaster General's office in Chicago.

Defendant submits that said office order 491 did not appoint Kniskern as contracting officer, as required by the existing and paramount regulations of the Secretary of War; that it is entirely consistent with all of the facts found by the court and General Orders Nos. 47 and 55, to conclude that Kniskern's duties were administrative and supervisory in character, and that he was not a contracting officer. In any event, the signing of the letter of December 10, 1918, was in direct violation of General Order No. 55 of the Secretary of War, and was not a signing "by the contracting parties with their names at the end thereof," as required by Rev. Stat. 3744, and as contemplated by Rev. Stats. 3745, 3746, and 3747.

It is also to be noted that the Comptroller of the Treasury ruled in 26 Comptroller's Decisions, 367, that proxy signed contracts were invalid because the provisions of Rev. Stats. 3745 and 3746 "do not permit a signing by proxy." Proxy signed contracts arising prior to November 12, 1918, were adjusted and settled under the Dent Act of March 2, 1919 (40 Stat. 1272), by the Secretary of War as agreements not executed in the manner required by law. (Vol. 3, Decisions of the War Department Board of Contracts and Adjustments, pp. 279, 282, 6 *id.* 37; 8 *id.* 567.)

Defendant respectfully submits that the letter of December 10, 1918, was not signed by any officer authorized to contract on behalf of the United States; that in any event the signing was

not with the names of the contracting parties at the end thereof as required by Rev. Stat. 3744 and General Orders 47 and 55; and that consequently the contract relied upon does not comply with the law, is invalid, and the United States is not liable for the alleged breach thereof.

V

But if there was an entire agreement within the requirements of Rev. Stat. 3744, and executed on behalf of the United States by a duly authorized contracting officer, for Army bacon deliveries for the months of January, February, and March, 1919, it was abrogated or rescinded by the mutual consent of the parties in issuing proposals for bids, submitting bids, and entering into contracts as required by law for the January and February deliveries of bacon

Assuming *arguendo* that the letters of November 12 and December 10, 1918 (R. 36, 37, 39), constituted an *entire* contract for Army bacon for the months of January, February, and March, 1919, and that either Kniskern or Menge, whose names are appended to the letter of December 10, 1918, had been appointed pursuant to Rev. Stats. 3744 and 3747, as contracting officer on behalf of the Government, then it must be held that subsequent conduct of the parties constituted a rescission or abrogation of said contract by the mutual consent of the parties.

The court found that the Quartermaster General, or Director of Purchase and Storage, as he was then designated (R. 28, 29), telegraphed General Kniskern on December 16, 1918, that " Effec-

tive with January requirements, the Army will purchase packing-house products independently of Food administration. * * * You are authorized to proceed on this basis." (R. 44.) There *were* proceedings on this basis; for, on December 19, 1918, the Depot Quartermaster sent to Swift and Co. a circular proposal requesting it to submit bids for January deliveries. Said company did submit a bid and the price was agreed upon for the January deliveries. (R. 44.) A purchase order was issued therefor on January 4, 1919, but for "some reason not appearing was canceled and another was issued on February 10, 1919." (R. 44.) Subsequently three formal contracts for January deliveries were executed by Swift and Company and by "J. C. Shugert, Quartermaster Corps, U. S. Army" bearing date of February 10, 1919. These contracts were approved by the Board of Review in the office of the Director of Purchases. (R. 45.) A similar request for bids for February deliveries was issued on January 7, 1919 (R. 44), a purchase order or acceptance was issued on February 4, 1919 (R. 45), and a formal contract bearing date of February 4, 1919, was similarly executed by Captain Shugert as contracting officer and approved by the Board of Review (R. 45). This was the procedure followed in the early stages of the War (R. 31), and the execution of the contracts in accordance with law was in compliance with General Orders, Nos. 47 and 55 (Appendix pp.

97, 99), and paragraph 942, Manual for the Quartermaster Corps (supra, p. 62).

These facts are similar to the facts in *Brown* v. *District of Columbia,* 127 U. S. 579, where it was alleged that a letter quoted at pages 580 and 581 of the report of the case constituted a contract for laying a number of yards of paving blocks. It was further shown that, subsequent to said letter, five written contracts were entered into for laying part of the blocks (p. 585) covered by the letter. This Court there said (page 587) that:

> The refusal of the board to accept any of the work, or to allow any certificate of its amount to be given until after other contracts, entirely different in terms, were duly entered into, and bonds were given for their faithful performance, negatives any suggestion of recognition or ratification by the District of Columbia of the alleged contract of December 10th, 1872, or of any acquiescence in its part performance. This claim is utterly inconsistent with the conduct of the company. *The very fact that it entered into these other contracts, different in terms from the alleged contract of December 10th, 1872, and accepted the certificates of the board issued for the work done under those contracts (and those alone) proves that it did not regard the verbal negotiations with Shepherd, and the unauthorized letter of Johnson thus disavowed by the board, as binding upon the District of Columbia.* (Italics ours.)

There is no statute requiring bonds to be given for the performance of War Department subsistence contracts, and the findings of the court below are silent as to whether bonds were furnished by Swift and Company for the alleged contracts for the January and February bacon. However, said prior contracts admittedly cover the January and February deliveries (R–44, 45) included in the letter of December 10, 1918 (R–39), which with Swift and Co.'s letter of November 12, 1918, was relied upon by the Court of Claims as constituting an *entire* contract. (R. 64, 72, 73.)

If it be true that the letters of November 12 and December 10, 1918, constituted an *entire* contract for a quantity of Army bacon, to be delivered during each of the three months of January, February, and March, 1919, we submit that the entering into three separate contracts for the part of the bacon delivered in January and into one contract for the part of the bacon delivered in February constituted a rescission or abrogation of the prior contract. The execution of contracts in accordance with Rev. Stat. 3744, and General Orders 47 and 55, for the January and February deliveries shows that all concerned did not regard the letters of November 12 and December 10, 1918, as constituting a contract good in law for the bacon for those two months. *If not good for these two months, it was certainly not good for the third month.*

The performance of the three contracts for January and the one contract for February, 1919, deliveries, executed on behalf of the United States by Captain Shugert, would not appear to be a partial performance of the alleged prior *entire* contract signed by A. D. Kniskern, etc., by O. W. Menge. In other words, the judgment of the court below against the United States for damages by reason of the failure of the Government to accept and pay for March, 1919, deliveries of bacon, appears to be erroneous from whatever angle the matter may be viewed.

VI

The court erred in holding that the claimant used due diligence in disposing of Army bacon Serial 10 in the United States, and in applying the wrong measure of damages to the facts disclosed

The pertinent facts disclosed by this record are as follows:

The claimant was advised by General Kniskern's letter dated January 24, 1919 (R. 40), that his office *would not be in the market* for bacon for delivery during March, 1919. He further advised: "such quantity of bacon as is now in process of cure over and above the quantity of bacon necessary to take care of February awards, and which has been passed by inspectors of this office, will be accepted."

On March 5th, under erroneous date of February 5, 1919, he further advised that none of the Army bacon over the quantities noted on February

contracts "will be required by this office," and that production should immediately cease. But he further stated: "Should, however, you have any issue bacon which is now in smoke and which is in excess of the amount required for February delivery, same will be accepted." (R. 42.)

Responding to a letter from claimant dated March 14, 1919, General Kniskern advised that it would be impossible for his office to receive any bacon for which purchase orders had not been prepared, and that "as soon as agreement is reached as to price and purchase orders have been prepared, shipping instructions will be furnished." (R. 47.)

However, by letter dated April 24, 1919, he further advised that his office was taking steps toward adjustment for materials on hand to be applied against March deliveries, "which allotments were cancelled," and requested a representative of the claimant to be present at his office on April 29th in order to be fully informed as to methods to be followed in submitting its claims. (R. 47.)

On April 29, 1919, he sent the claimant papers " necessary to prepare in order to file a claim for any amount you may consider due from the various packing-house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss *by reason of cancellation of those orders.*" (R. 48.)

By virtue of these last two letters, the claimant was fully notified that no part of the bacon prepared

for March delivery would be accepted by the Government, and that March allotments had been cancelled.

On August 29, 1919, General Kniskern wrote the claimant, among other things, that he could not conduct negotiations as to the adjustment of "the informal contracts" until the claim had been assigned to his office, and "it will not be possible for the Government to dispose of them (the bacon) until the negotiations are completed and the actual ownership determined by the Government, taking them at the agreed price or turning them over to you on a basis similar to the salvage basis of unfinished material." (R. 48, *supra*, p. 16.)

He follows this with unauthorized suggestions as to the disposition of the bacon, leaving no room for doubt that the claimant had always been at liberty to dispose of it in some method or other. He states that he can not give positive instructions as to the disposal "of *any* of this product which at this time may be in your possession," and then uses language which undoubtedly recognized the claimant's existing right to dispose of it. (R. 48.)

It can not be held that the Government ever turned this bacon over to be handled for its account. This is shown by General Kniskern's letter of August 29, 1919 (R. 48), where he states that no such procedure could be adopted until after determination by negotiations.

Nothing can be found in the findings of fact to show that the Government prohibited or prevented

the claimant from establishing the market value to be relied upon in a claim for damages, by a sale either at or near the time either of delivery or of cancellation of the contract.

Whatever the status of negotiations between General Kniskern and the claimant prior to April 24, 1919, it is evident that on that date the claimant was definitely advised that no part of the bacon put up for March delivery would be accepted by the Government.

The record further shows (R. 49) that not until September, 1919, did the claimant actually begin to dispose of the bacon which the Government had refused to accept on April 24th. In other words, *nearly five months intervened between the cancellation of the order and the practical attempt to dispose of the rejected product.*

Furthermore, the record discloses (R. 50) that the price of hogs, upon which were based, to a large extent, the cost and the selling price of the finished product, *advanced* throughout the first seven months of 1919, and that thereafter, until January, 1920, the price continued to *decline.*

Under these conditions, it is respectfully submitted, there can be no practical application of the rule that a vendor's measure of damages is the difference between the contract price and the market price, *as shown by a sale made under conditions which establish that market price.* The sale was here made about five months after the original date

of delivery. During a great part of those five months, the raw material market would naturally have functioned to the benefit of the vendee. At the end of those five months, the raw material market was declining, and continued to decline throughout the time of the sales. Yet the only market price disclosed by the record is based upon sales made between September, 1919, and October, 1920, at a time when the market was far less favorable to the defendant than in March, 1919 (the time of delivery). On the question of the market price in March, 1919, the record is absolutely silent.

It is submitted that where the record is thus deficient there can be no recovery.

In *Shepard* v. *Hampton,* 3 Wheat., 200, Chief Justice Marshall said:

> The only question is, whether the price of the article at the time of the breach of the contract, or at any subsequent time, before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article, *at the time it was to be delivered,* is the measure of damages.

While General Kniskern, in his letter of August 29th, indicated the prices then being received by the Government for bacon of this character, these prices were made in a market nearly five months after the notice of cancellation, and more than five months from the date of delivery. His letter, therefore, can not be treated as proof from which to determine the market value in March or April.

In *Smith* v. *Pettee*, 7 Hun. (N. Y.) 334, 335, the court said:

> But to conclude the purchasers by the result of such a sale it should take place as soon after the refusal to accept the property as that could practically be made. That was not done in this case, but the iron was retained in store by the plaintiffs for a period of very near four months, and during this time the market price of that description of iron was continually depreciating. * * * They could not keep it in store for months as they did and then charge the loss caused by that delay upon the purchasers, for to that extent it was not the consequence of the defendants' fault but of the plaintiffs' injudicious delay in the sale of the property.

Warren v. *Stoddart*, 105 U. S. 224, 229, declares that it is the plaintiff's duty to avoid consequential damages so far as reasonably possible. No action can be maintained for alleged losses which were increased through failure by the plaintiff to dispose of the product within a reasonable time after the breach. The claimant in this case can not keep the property for an unreasonable time and then dispose of it on a declining market, and then seek to bind the Government by the price obtained in such circumstances.

In *Friedenstein* v. *United States*, 35 Ct. Cls. 1, 8, the court said:

> It then (upon the breach) became plaintiff's duty to sell such copper as he had

> on hand (if he had any) within a reasonable time if he expected to hold the Government liable for damages for breach of contract. We think the breach fairly dated from that time.
>
> But plaintiff took no action, made no effort to save himself from loss, retained presumably whatever copper he had on hand until the price went down, and then brought suit.

There are no facts disclosed by this record which establish that the prices obtained from September, 1919, to January, 1920, were the same, or approximately the same, as would have been obtained by a sale immediately subsequent to the cancellation of the alleged order in April, 1919. The actual prices obtained ranged from 33½ cents down to 22$\frac{7}{12}$ cents per pound in sales. The bulk of the sales were made before February, 1920; but they were not entirely completed before October, 1920. (R. 49.)

The court below appears to hold that the claimant is entitled to the benefit of full performance as to the bacon which was prepared for delivery in March and which was subsequently sold as above stated. It applies a measure of damage which consists of the contract price of that bacon (made up of the alleged cost of production plus a certain profit), less the net value received by the claimant on resale; or in other words, less the salvage value *as established by sales made from five to thirteen*

months after the alleged default. The claimant's petition was based upon several different theories as to its cause of action. But the judgment is predicated only upon an express contract, bringing the cause of action within the general jurisdiction of the Court of Claims, under Section 145 of the Judicial Code. It is therefore essential to ascertain what contract, if any, is actually the basis of the present judgment. So far as can be gathered from the opinion, the court below substantially predicates its judgment upon an express contract embodied in letters dated November 12, 1918, and December 10, 1918, passing between the claimant and General Kniskern. But it is clear that there never was any performance of this alleged contract by way of *complete* manufacture and tender of the manufactured article.

Further, the court below (R. 73) treats General Kniskern's letters of January 24, 1919, and March 5, 1919, as in some degree *modifying* the contract embodied in the earlier letters. But the claimant has never contended that the letters of January 24th and March 5th constituted a contract of any kind. Certainly they do not constitute a contract in writing, of the type required by statute to bind the Government. As a matter of fact, the claimant disavowed any such contention in the court below.

In April, 1919, when the contract was cancelled, the bacon here involved was in existence. The question then arises as to what is the proper measure of damage to be applied. To establish this,

there must be a finding that there was a *market price* for this bacon immediately after notice of cancellation of the order. Such a finding is nowhere in the record. There are no facts found, beyond the facts with reference to the cost of raw material (hogs), which in any way establish the true relation of the market price in March or April, 1919 (the time of the breach), to the market price in September or December (the time of alleged sale).

Two questions will be considered, namely, (1) what is the proper measure of damages to be applied under these conditions, and (2) if the difference between the contract and the salvage value is the measure to be applied, whether there is any duty of due care and diligence imposed on the vendor in making the salvage sale.

Referring to the first of these questions, in 2nd Benjamin on Sales, 3rd edition, p. 1075, Sections 1011, 1012, it is stated:

> Where a contract to deliver goods at a certain price is broken, the proper measure of damages, in general, is the difference between the contract price and the market price of such goods *at the time when the contract is broken,* because the purchaser, having his money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them. The

> date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract and to refuse to accept the goods.

In *Friedenstein* v. *United States,* 35 Ct. Cls. 1, 8, the Court said:

> The measure of damages for the refusal of a purchaser to receive a commodity under a contract of sale is the difference between the contract price and the market price *at the time and place of the breach of the contract.*

In *Harkness* v. *Russell,* 118 U. S. 663, 667, the Court said:

> Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale.

Under an executory contract, where a manufacturer agrees to make an article for the buyer, which the latter refuses to accept, the measure of damages uniformly applied is the market value *at the time when the article should have been accepted. Carpenter* v. *First National Bank,* 119 Ill., 353, syl. 6; *The Pittsburgh, Cincinnati & St. Louis R. R. Co.* v. *Heck,* 50 Ind. 303; *Dollman* v. *Studebaker,* 52 Ind. 286; *Fell* v. *Muller,* 78 Ind. 507, and cases cited.

Malcomson v. *Reeves Pulley Company,* 167 Fed. 939, 93 C. C. A. 339 (decided by Circuit Judge Severens and District Judges Knappen and Sanford), involved the purchase of 500 "air-cooled" automobile engines to be built for the purchaser and shipped in specified quantities at various times at a stated price. It was proven at the trial that the manufacturer had made all reasonable efforts to sell to third parties the balance of the engines called for by the contract which the purchaser had declined to accept and pay for. The manufacturer was unable to resell more than a limited number of the motors. It was not clear whether more than 400 of the 500 engines had been made, because the manufacture of "air-cooled" motors had been discontinued in favor of the water-cooled type. In this respect, the case was closely analogous to the case at bar; for here the manufacture of "Army" bacon had been abandoned in favor of the somewhat different "commercial" type. (R. 50.)

In treating of the measure of damages, the court said (167 Fed. 939, 942):

> The measure of damages for the refusal of a vendee to accept a completely manufactured article *is not the purchase price, but is the difference between the purchase price and the market value at the time and place when acceptance is required.* This proposition is too well settled to require elaboration or to justify more than the merest reference to authority. See *Peters* v. *Cooper,* 95 Mich. 191, 54 N. W. 694; *Yellow Poplar Lumber*

Co. v. *Chapman,* 74 Fed. 444, 20 C. C. A. 503; *Southern Cotton Oil Co.* v. *Heflin,* 99 Fed. 339, 39 C. C. A. 546, and cases cited. [Italics ours.]

It is conceded that there is a difference between "commercial" bacon and "Army" bacon, and that the market for "commercial" bacon is much larger and purchasers more numerous. But, as shown by this record, a market did exist upon which to establish the value of "Army" bacon also. The preparation of Army bacon, an edible commodity (designated "a valuable food product" in General Kniskern's letter of August 29, 1919), in principle, is not comparable either to the construction work involved in large buildings or public works, or to the production of intricate machinery intended for the special use of the vendee under conditions peculiar to his necessities and for which no other purchasers can be found. There is no such difference between "Army" bacon and "commercial" bacon (both being food products available for general consumption) as would require the application of a special measure of damages, different from that applied to ordinary commercial contracts. To the extent that "commercial" bacon is more readily marketable than the "Army" type, the difference is reflected in the prices of each.

Reliance has been placed by the claimant upon *United States* v. *Behan,* 110 U. S. 338; *Hinckley* v. *Pittsburgh Steel Company,* 121 U. S. 264; and

Frederick v. *American Sugar Refining Company,* 281 Fed. 305.

The *Behan* case involved a contract with the Government for construction work in connection with harbor improvements at New Orleans. The claimant had made preparations and incurred expenses in connection with the machinery, materials, and labor necessary to fulfill the contract. It was then determined that the proposed work was inadvisable. The contract was cancelled and the claimant was ordered to cease work.

The court held that the claimant's damages consisted of two items: First, his outlay and expense, less the value of materials on hand; second, the profits he might have realized by performance. No profits, however, could be established. It will be noted that this case involved construction work of a peculiar type, where, by no possibility, could the ordinary measure of damages be applied. The construction work there involved is in no way comparable to the preparation and sale of Army bacon, especially where a market value of the bacon can be established by sale.

The *Hinckley case, supra,* is more clearly analogous to the case at bar, but there is still a distinction. The facts there were that a Steel Company had sold to Hinckley certain quantities of steel rails which were to be "drilled as may be directed." The vendee refused from time to time to give instructions as to the drilling. The evidence was that the drilling on steel rails required by various railroads

differed, and that there was no standard form of drilling which permitted the completion of the contract according to its terms in the absence of instructions from the vendee. The vendee indicated his determination not to receive the rails. The rails were never manufactured according to the terms of the contract.

The measure of damages applied under those conditions was the contract price less the ascertained cost of production, if the rails had been completed, less the profits received by the vendor from the sale of other products made from a portion of the steel purchased to comply with the contract.

It will be noted that the action of the vendee prevented the manufacture of any part of the rails involved in the contract, and that therefore there could never have been a resale to ascertain their market value. But, in the case at bar, so far as it concerns the Army bacon disposed of by the claimant, the manufactured product was in existence when the order was cancelled. There was no reason why the market value could not have been ascertained by a *prompt* sale so that the ordinary measure of damages could be applied. In the *Hinckley case* it will be noted that, due to the refusal of the vendee to give specifications essential to the completion of the contract, the exact terms of the contract could not be fulfilled. In the case at bar, complete preparation of the bacon rested with the vendor, and the Government did nothing to prevent the

sale upon the open market of the bacon already prepared.

If the *Hinckley case* gives the general rule as to the measure of damages, it is difficult to see what becomes of the long line of established decisions which fix the measure of damages at the difference between the contract price and the market price *as of the date and place of delivery or breach.*

The special rule as to the measure of damages for the nonacceptance of articles manufactured especially to fill an order, rests not so much upon the fact of production as upon the fact that the article produced, being designed for a special purpose and a special person, cannot readily be resold as an article of commerce, since it has no "*market*" value.

Frederick v. *American Sugar Refining Company, supra,* involves the partial acceptance by the Circuit Court of Appeals for the 4th Circuit of a measure of damage laid down by the Supreme Court of Appeals of Virginia. The vendor had completed production of the article ordered, and had made tender and delivery according to the exact terms of his contract. Delivery was refused by the vendee. The Virginia court held that the vendor had a right to sue for the contract price of the goods, and thereafter *at any time at his election to make a resale,* crediting the vendee with the net proceeds of the resale. The Virginia court further held that the vendor had a right to make such sub-

sequent sales *at any time he might elect,* by virtue of his lien upon the goods.

In the first place, it is to be observed that in the case at bar there was never any completion of the exact terms of the alleged contract, nor was there ever any complete tender to the Government of the goods which were the subject of that contract. It is true that, in all probability, subsequent completion and tender would have been made but for the fact that the Government agent notified the claimant to cease to produce. But it is evident that if the claimant desired to make application of the rule stated in the case just cited, he must have proceeded to full execution of the contract and tender thereon.

The opinion in the *American Sugar Refining Company case, supra,* at pages 309–310, shows that the authorities relied upon for the measure of damage there stated, are entirely decisions by courts of various States, and do not reflect decisions of Federal courts.

In the *Malcomson case,* at page 942 (*supra,* p. 87), it is apparent that the measure of damage there set out is based largely upon decisions of Federal Circuit Courts of Appeals.

From the opinion in the *American Sugar Refining Company case* (p. 309), it is further apparent that the court did not adopt *in toto* the rule laid down by the Virginia Court of Appeals, to the effect that the vendor has the right *at any time at his unrestricted option* to make sale of the rejected product for the account of the vendee.

The court said (281 Fed. 309):

> Just a word should be said, perhaps, as to the time in which the resale was made. While there was considerable time between August and December, 1920, when the first sale was had, it will be found upon careful examination of the facts that it would have been impracticable to have made sale of the abandoned sugar between August and November, on account of the fluctuating market, and, indeed, lack of a market at all, and in the interim the defendant was kept advised of his continuing default, and given full and ample opportunity to protect himself at the sales as soon as it was practicable to make the same, which took place in December and January, *and as early as the court believes, from the whole testimony, it was judicious to make the same.* Certainly nothing occurred in connection with the resale to relieve the defaulting vendee from responsibility, and placing the same upon the vendor. [Italics ours.]

It is respectfully submitted that the facts in the case at bar as to the subsequent disposition of the army bacon manufacured for March delivery show conditions entirely different from those referred to in this quotation.

In the case cited, the court found that there was *no market* substantially in existence for the sale of the sugar prior to the actual resale made by the vendor. This, of course, would have prevented a

resale establishing a market price *as of the same time and under the same conditions* as at the date of the breach. In the case at bar, the weight of the evidence is that there *was* a market for the sale of Army bacon at the time of the breach, under conditions more propitious than those which existed five months later, when it was resold at continually decreasing prices. There was unnecessary and injurious delay in the disposition of the bacon by the claimant. There were no reasons disclosed why the claimant should not have made prompt disposition and sale immediately after the express notice of cancellation of the March order. The findings of fact do not give rise to a legal excuse for not making prompt sale. General Kniskern's letter of August 29, 1919, can not, by any construction of language, be held to indicate that the Government either forbade, or objected to, prompt sale.

In *Guy* v. *United States,* 25 Ct. Cls. 61, 68, the Court of Claims went so far as to say that a vendor to the Government of a certain amount of oats, part of which had been delivered, could not recover damages after cancellation of the contract as to the undelivered portion, although "apparently acting upon the encouragement orally given to him that the defendant might take the oats at some future time." The vendor, after three months' delay, sold the undelivered oats upon a decreasing market

price, without notice to the Government. His right of recovery was denied.

It is true that in the letter of August 29, 1919, General Kniskern expressly stated his lack of authority to give any instructions as to a sale. But, unofficially, and as a personal opinion, he suggested the sale of this bacon *in the United States.* In view of his express denial of authority to give advice, the claimant, in making a sale, must be held to have acted of its own volition and without notice to this defendant.

In conclusion, it is submitted that the court below erred in finding that the claimant had exercised due diligence in the disposition of that part of the bacon which was sold in the United States. It was likewise error to establish a measure of damages in this case, other than the general rule, established by the weight of authority, that the measure of damages is *the difference between the purchase price and the market value of the goods at or about the time and place of delivery or alleged breach.* Since the claimant did not establish the market price by a sale substantially as of the time of cancellation of the alleged order, and since the record does not otherwise establish that price, the claimant has not proved his damages, and can not recover.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below erred in entering judgment for the claimant on its petition. The

judgment of the Court of Claims should be reversed; and the petition should be dismissed.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.
ABRAM F. MYERS,
RUSH H. WILLIAMSON,
Special Assistants to the Attorney General.

NOVEMBER, 1925.

APPENDIX

GENERAL ORDERS
No. 47

WAR DEPARTMENT,
Washington, May 11, 1918.

* * * * *

V–1. Revised Statutes 3744 to 3747 provide as follows:

SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return. (See Secs. 512–515.)

SEC. 3745. It shall be the further duty of the officer, before making his return, according to the

preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths:

> I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

SEC. 3746. Every officer who makes any contract and fails or neglects to make return of the same according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.

SEC. 3747. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.

Extract from Chapter 29, 1st Session, 1917. June 15, 1917. (House Resolution 3971.) Statutes, 1917, p. 198:

SEC. 3744, Revised Statutes, is hereby amended by adding the following at the end of the last sentence:

> *Provided,* That the Secretary of War or Secretary of the Navy may extend the time for filing such contracts in the Returns Office of the Department of the Interior to 90 days whenever in their opinion it would be to the interest of the United States to follow such a course.

2. Numerous failures on the part of contracting officers of the War Department to comply with the provisions of these statutes have been brought to the attention of the department. The chiefs of the several supply bureaus will insure a precise and immediate compliance with these statutes. All contracting officers of the War Department will familiarize themselves with these statutes and comply accurately with their provisions.

(160.14, A. G. O.)

By Order Of The Secretary Of War:

PEYTON C. MARCH,
Major General, Acting Chief of Staff.

Official:

H. P. MCCAIN,
The Adjutant General.

GENERAL ORDERS, No. 55

WAR DEPARTMENT,
Washington, June 10, 1918.

* * * * *

VII. Paragraph 2, section V, General Orders, No. 47, War Department, 1918, is amended to read as follows:

No contract will be signed by an officer whose name does not appear in the body of the contract

as the contracting officer. Contracts will be made in the name of, and will be signed by, the officers designated by the chief of the bureaus to which the contracts pertain, such appointments to be effective only after announcement of the names, rank, and contracting authorities of such officers by the chief of the bureau concerned. Any officer so appointed shall be designated in the contract itself as the contracting officer and shall make and personally sign contracts in his own name. This shall be strictly complied with. Paragraph 563, Army Regulations, requires that the officer signing the contract shall be the person who makes the affidavit of disinterestedness, and this paragraph shall be strictly complied with.

(062.1, A. G. O.)

* * * * *

By Order Of The Secretary Of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

H. P. MCCAIN,
The Adjutant General.

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER
GENERAL OF THE ARMY,
Washington, July 3, 1918.

OFFICE ORDER No. 491.

Subject: Packing-house products branch of the Subsistence Division, Office of the Quartermaster General.

1. There is established in Chicago a packing-house products branch of the Subsistance Division

in the Office of the Quartermaster General. This branch shall be located in the general supply depot of the Quartermaster Corps at Chicago, and shall be under the immediate direction and control of the depot quartermaster.

2. The packing-house products branch shall be responsible for all matters pertaining to the procurement, production, and inspection of packing-house products.

3. In the performance of its duties this branch shall receive such requisitions and make such purchases of packing-house products as may be designated from time to time by the Office of the Quartermaster General. In this connection the branch will either prepare the purchase orders or contracts, as the case may be, or, if the circumstances make it desirable, may, at the option of the branch, delegate this duty to depot or other quartermasters.

4. It shall be the duty of this branch to supervise all matters pertaining to the production of packing-house products, and in this connection it shall have supervision over such inspectors as may be assigned to it, shall assign such inspectors to duty in the several zones as may be required, and may transfer inspectors from one zone to another.

5. All purchase orders or contracts made by this branch shall be transmitted to the general supply depot in whose zone the products are to be prepared; and the quartermaster directing such depot shall, under the supervision of the branch, have immediate charge of all matters pertaining to preparation, inspection, delivery, storage, shipment, and payment as if the purchase had been made by him.

6. The performance of the foregoing duties is subject to the control of the Office of the Quartermaster General.

By authority of the Acting Quartermaster General.

BENJ. L. JACOBSON,
Major, Q. M. R. C., Acting Executive Officer.

Paragraph 724, Manual for the Quartermaster Corps:

A. Proposal and acceptance agreements or circular proposals and letters of acceptance may be used in contracting for any supplies or services, *except* where the construction, repair, or alteration of public work (including vessels), is involved, to be procured by the Quartermaster Corps (and such agreements will constitute valid binding contracts) when—

1. The amount involved does *not exceed $500,* irrespective of the time required for completion; or

2. The time required *for completion* is not more than 60 days, and the amount involved does not exceed $5,000. (Italics ours.)

B. Contracts reduced to writing and signed by the contracting parties *with their names at the end thereof* shall be used in all cases when the transaction involves—

1. An amount of more than $5,000, irrespective of time required for completion.

2. Construction, repair, or alteration of public works (including vessels), except when amount involved does not exceed $500 and transaction is an open-market purchase.

C. Contracts reduced to writing and signed by the contracting parties with their names at the end

thereof may be used in such other cases as, in the judgment of the contracting officer, may be essential to the best interests of the United States.

Effective August 27, 1917, and continuing during the present emergency, the provisions of this paragraph are suspended in so far as requires the making of the usual formal contract for purchase of *supplies* when the amount involved is more than $5,000 and the time for delivery does not exceed 30 days. When under such limits agreements for procurement of supplies may be made in accordance with a short form, authorized for the purpose, similar to proposal and acceptance agreements.

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER
GENERAL OF THE ARMY,
Washington, October 3, 1918.

Notice No. 179.

Subject: List of Purchasing and Contracting Officers.

1. As provided in paragraph 5 of this Notice No. 66, from the office of the Quartermaster General, dated August 7, 1918, the following officers have been nominated and appointed as Purchasing and Contracting Officers for the places and stations indicated, such appointments being with general contracting powers and for an indefinite period of time, unless otherwise stated:

PROCUREMENT DIVISIONS, O. Q. M. G.

Clothing & Equipage Division:
Major H. M. Schofield.
Capt. Albert J. Farnsworth.

Leather Subdivision, C. & E. Div.:
Lt. Col. G. N. Goetz.
Capt. A. F. Cochran.
Capt. J. D. Goodpasture.
Conservation & Reclamation Division:
Lt. Col. P. N. Merzigg.
Major W. Lester
Fuel & Forage Division:
Lt. Col. U. G. Lyons.
Major John Roberts.
Capt. L. E. Molineaux.
Hardware & Metals Division:
Major E. A. Darr.
Major H. P. Hill.
Lt. Carl W. Bliss.
Remount Division:
Col. W. S. Valentine.
Col. A. M. McClure.
Maj. E. O. Trowbridge.
Maj. C. L. Scott.
Capt. E. B. Allen.
Capt. J. W. Appleton.
Capt. Brook Baker.
Capt. Archibald Barklie.
Capt. Frank Barr.
Capt. R. A. Baxter.
Capt. B. A. T. Bell.
Capt. Geo. A. Bell.
Capt. W. S. Cameron.
Capt. Benj. Chew.
Capt. N. V. Colt.
Capt. T. E. Davis.
Capt. Wirth S. Dunham.
Capt. H. W. Frost.
Capt. Fletcher Harper.

Capt. A. H. Higginson.
Capt. Spaulding H. Jenkins.
Capt. J. J. McCartney.
Capt. H. S. Neilson.
Capt. Clarence Robbins.
Capt. Q. A. Shaw.
Capt. St. Clair Street.
Capt. F. S. Von Stade.
Capt. Howard Willett.
Lt. M. O. Knott.
Lt. M. C. Law.
Capt. M. M. Smith (Eastern Purchasing Zone).

GENERAL SUPPLY AND SUBDEPOTS

Atlanta, Ga.:
Lt. Col. G. R. Gray.
Maj. Geo. M. Alden.
Capt. Louis W. Winterberger.
Baltimore, Md.:
Maj. J. E. Schiller.
Maj. A. M. Miller.
Expeditionary Depot:
Maj. J. H. Ross.
Boston, Mass. (Cambridge):
Col. A. W. Yates.
Maj. W. K. Nash.
Capt. T. G. Turner.
Chicago, Ill.:
Maj. Chas. Caswell (Hardware & Metals).
Maj. Geo. F. Mayer (Clothing & Equipage).
Maj. Geo. E. McGowan (Subsistence).
Maj. E. J. Zimmerman (Conservation & Reclamation).
Capt. Langhorn Allen (Motors).

Capt. G. W. Cook (Subsistence).
Capt. Seymour Morris (Construction & Repair).
Capt. J. C. Shugert (Subsistence).
Lt. Jean A. Crandall (Vehicles & Harness).
Lt. M. R. Upton (Fuel & Forage).

El Paso, Tex.:
2nd Lt. L. D. Lawson.

Fort Sam Houston, Tex.:
Capt. T. O. Baker (Subsistence).
Capt. F. M. Kerr (Clothing & Equipage, Misc.).
Lt. J. W. Coyle (Fuel & Forage).

New Orleans, La.:
Capt. P. T. Murphy.

Newport News, Va.:
Capt. Melvin R. Ginn.
Lt. Harry W. Bryan (Subsistence).

New York City:
Capt. John R. Holt.

Philadelphia, Pa.:
Lt. Col. John S. E. Young.
Capt. Jos. L. Blaybock.
Expeditionary Depot:
Col. J. B. Houston.
Capt. D. L. Coulborn.

San Francisco:
Col. G. S. Bailey (Misc.).
Maj. M. L. Gerstle (Clothing & Equipage).
Capt. H. M. Weidenfeld (Subsistence).

St. Louis:
Maj. Robt. Field.

Washington, D. C.:
Capt. H. A. Barnard.

Brownsville, Texas:
Capt. Edward T. Burnley.

Kansas City, Mo.:
Lt. W. E. LaRoe.
Lt. Carl W. Allison.
Los Angeles, Cal.:
Col. Wm. G. Gambrill.
Capt. Peter Hanses.
Marfa, Tex.:
Maj. Carl A. Hardigg.
Portland, Ore.:
Lt. Col. Sam R. Jones (Leases).
Capt. Wm. J. Lindenburg.
Capt. Chas. Steinhauser (Misc.).
Seattle, Wash.:
Col. Geo. Rhulen.
Dallas, Tex.:
Lt. Q. T. Gobrecht.
Remount Depot, Front Royal, Va.:
Capt. LeRoy S. Barton.

DEPARTMENTS

Eastern:
Col. Robert S. Smith.
Northeastern:
Capt. J. H. Lane.
Southern:
Lt. Edward Mechling.
Southeastern:
Col. R. N. Thomas.
Hawaiian:
Maj. Fred S. Buckley (Misc. Supplies).
Capt. H. W. Murray (Construction & Repair).

COAST ARTILLERY DISTRICTS

North Atlantic:
Lt. Col. E. D. Powers.

South Atlantic:
Capt. Robt. H. Van Volkenburgh.

CAMPS

Camp Beauregard, La.:
2nd Lieut. Wm. R. Goldberg.
Camp Bowie, Texas:
Capt. A. W. Stanley.
Camp Cody, N. M.:
Capt. Geo. Nash (Aux. Remount).
College Station, Texas:
Lt. Wayne C. Whatley.
Corpus Christi, Texas:
Capt. W. N. Curtis.
Camp Custer, Mich.:
1st Lt. E. E. Follin.
Del Rio, Texas:
Capt. Jas. A. Massa.
Camp Devens, Mass.:
Col. Maurice O'Connor (Subsistence).
Capt. Harry B. Parker (Supplies, except Subsistence).
Camp Dick, Texas:
Capt. D. S. Bliss.
Camp Dix, N. J.:
Capt. Wm. Bethke.
Camp Jackson, N. C.:
1st Lt. Hubert P. Williams.
Camp Jos. E. Johnston, Fla.:
Maj. C. B. Franke.
Camp Kearney, Calif.:
Maj. Frank P. Tingley.
2nd Lt. Robt. G. Thorpe.
Las Casas, P. R.:
Capt. L. D. Barr.

Camp Lewis, Washington:
Lt. Col. Jas. H. Como.
2nd Lt. Jas. L. Patterson (Aux. Remount).
Camp MacArthur, Texas:
Maj. H. W. Hardeman.
Capt. R. L. Fain.
Capt. D. Van Gelder.
Capt. Goeffrey L. Lyon (Aux. Remount).
Camp Dodge, Iowa:
Capt. C. J. Falkenthal.
Camp Fremont, Calif.:
Capt. Raymond Boyd.
Camp Funston, Kans.:
1st Lt. John M. Reardon.
Camp Gordon, Ga.:
Capt. LeRoy M. Woerner.
1st Lt. Henry M. Green.
1st Lt. John G. D. Hightower.
Capt. Chas. Mayer (Aux. Remount).
Camp Greene, N. C.:
Maj. S. J. Seals.
Capt. Chas. M. Miller (Except Subsistence).
Capt. Robt. P. Roloff (Utilities supplies).
2nd Lt. Jacob I. Goodstein (except S bsistence).
2nd Lt. Fred R. Hudson (Subsistence)
Camp Hancock, Ga.:
Maj. Alexander Fitz-Hugh.
Capt. C. S. Warshauser.
Camp Humphreys, Va.:
Maj. E. A. N. Baker.
Capt. Geo. R. White.
Capt. Thos. C. Jones (Subsistence).

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Camp Sheridan, Ala.:
1st Lt. Wm. B. Love.
Capt. J. M. Morrell (Aux. Remount).
Camp Sherman, Ohio:
1st Lt. Wm. H. Davis (Except Subsistence, Authority expires Feb. 28, 1919).
1st Lt. Edmond B. Howard (Subsistence, Authority expires Feb. 28, 1919).
Camp Stanley, Texas:
Capt. Geo. R. Kitchen.
Camp Taylor, Ky.:
Capt. Jas. G. Eversole (Subsistence).
Lt. F. E. Cavanaugh (Except subsistence).
Capt. Roy A. Baxter (Aux. Remount).
Camp McClellan, Ala.:
Maj. H. M. Mangus.
Capt. T. J. Phillips.
Camp Meade, Md.:
1st Lt. Clare S. Johnson.
Camp Merritt, N. J.:
Lt. Col. John Fawcett.
Capt. Albert Johnson.
Camp Shelby, Miss.:
Maj. Geo. H. Weller.
2nd Lt. A. H. Gerde.
Camp Travis, Texas:
Capt. Albert Lobits.
1st Lt. Earl H. Eddleman.
Camp Upton, N. Y.:
Lt. Col. A. H. Davidson.
1st Lt. Wm. S. Bouton.
2nd Lt. Leo. A. Mangan.
Camp Wadsworth, S. C.:
2nd Lt. Sidney W. Bishop.

Camp Wheeler, Ga.:
Lt. Col. Chas. J. Nelson.
1st Lt. James Burlington (Purchasing Officer only).

FORTS

Fort Adams, R. I.:
Capt. R. G. Thackery.
Fort Armstrong, Hawaii:
Capt. John S. Scally.
Fort Apache, Ariz.:
Capt. H. W. Niemeyer.
Fort Banks, Mass.:
Capt. Gustave B. Ballard.
Fort Benjamin Harrison, Ind.:
Capt. W. S. King.
Fort Bliss, Texas:
Capt. J. A. Barnes.
Fort Clark, Texas:
Capt. August Pitman.
Fort Des Moines, Iowa:
Capt. Lemuel Betty.
Fort De Russey, Hawaii:
Capt. John S. Scally.
Fort Douglas (Ariz.):
Capt. F. W. Rea.
Fort Douglas, Utah:
Capt. F. L. Fink.
Fort Dupont, Del.:
Capt. Harvey P. Winslow.
Fort Ethan Allen, Vt.:
Capt. Ledyard Cogswell.
Fort Hamilton, N. Y.:
2nd Lt. Lynn H. Thompson.

Fort Hancock, N. J.:
Maj. O. H. Balch.
Fort Howard, Md.:
1st Lt. Walter B. Swindel.
Fort Huachuca, Ariz.:
Capt. Bernard Sharpe.
Fort Kamehameha, Hawaii:
Capt. John S. Scally.
Fort Totten, N. Y.:
Capt. Julius Tannebaum (Construction and Repair only).
Fort Mason, Calif.:
Lt. Col. Geo. G. Bailey.
Fort McIntosh, Texas:
2nd Lt. G. F. Price.
Fort McPherson, Ga.:
Maj. Paul A. Larned.
Fort Nogales, Ariz.:
Capt. Theodore L. Fitchtel.
Fort Preble, Maine:
Capt. Jas. L. Glascock.
Fort Rodman, Mass.:
2nd Lt. Edward J. Phillips.
Fort Russell, Wyo.:
Capt. Wm. P. Simpson.
Fort Ruger, Hawaii:
Capt. John S. Scally.
Fort Schuyler, N. Y.:
Capt. Julius Tannebaum (Construction & Repair).
Capt. Harry Dayton (Construction & Repair).
Fort Shafter, Hawaii:
Capt. Frank J. Dougherty.

Fort Sill, Okla.:
Col. Geo. D. Guyer (Equipage & Misc. Supplies).
Maj. J. T. Stockton (Fuel & Forage & Reclamation).
Artillery Training Center:
Capt. W. J. Heid.
Fort Slocum, N. Y. (Recruit Depot):
Maj. H. C. Zimmerman.
Fort Snelling, Minn.:
Capt. L. S. D. Rucker.
Fort Thomas, Ky.:
Capt. Aaron Freeman.
Fort Wood, N. Y.:
2nd Lt. R. F. Russell.

SCHOOLS AND TRAINING DETACHMENTS

Aerial Gunnery, Mt. Clemens, Mich.:
Capt. Thos. F. Cook.
U. S. Military Academy, West Point:
Col. E. J. Timberlake.
University of Florida:
2nd Lt. Raymond W. Hogan.
University of Maine:
Warren S. M. Hollaway.
University of Akron, O.:
2nd Lt. Edward B. Hurrell.
University of Texas:
2nd Lt. Howard Bland.
University of Vermont:
2nd Lt. Wm. D. Smith.

HOSPITALS

Army & Navy Hospital, Hot Springs, Ark.:
Major J. E. Ash.

U. S. A. Gen. Hospital No. 1, N. Y.:
Capt. Robt. M. Ewing.
U. S. A. Gen. Hospital No. 2, Ft. McHenry:
Capt. Wm. W. Heaton.
Capt. Wm. U. Watson.
U. S. A. Gen. Hospital No. 4, Ft. Porter, N. Y.:
Capt. John H. Baker.
Madison, N. Y.:
2nd Lt. John S. Donahue.
New Haven, Conn. (Recruiting):
Col. W. A. Mercer.
Scofield, Hawaii:
Capt. Wm. J. Murphy.
U. S. A. Gen. Hospital No. 7, Roland Park, Md.:
Capt. W. B. Bradley.
U. S. A. Gen. Hospital No. 9, Lakewood, N. J.:
1st Lt. Walter M. Waskon.
U. S. A. Gen. Hospital No. 22, Richmond, Va.:
1st Lt. Jas. J. Walsh.
Plattsburg, N. Y.:
Capt. D. E. Marcy.
Capt. E. N. Strout.
Whipple, Ariz.:
Lt. Walter S. Barnes.

FIELDS

Brooks Field, Texas:
2nd Lt. A. W. Lee.
Carlstrom Field, Fla.:
2nd Lt. H. U. Fiebelman.
Caruthers Field, Texas:
2nd Lt. John J. Davlin.
2nd Lt. Clinton O. Potts.
Kelly Field, Texas:
Capt. Louis V. DeBirney.

Park Field, Tenn.:
1st Lt. J. L. Palmer.
Post Field, Okla.:
Capt. J. A. King.
Taylor Field, Okla.:
2nd Lt. F. W. Fisher.

ARSENALS

Rock Island, Ill.:
1st Lt. Samuel J. Lewis (Conservation & Reclamation).
2nd Lt. Clifford Martin.

2. Quartermasters of all depots, camps, forts, posts, and other military establishments who have not nominated officers for appointments as Purchasing and Contracting Officers, as required by Paragraph 3 of Notice 66, dated August 7th, 1918, are directed to submit names for such appointments to the office of the Quartermaster General immediately.

By authority of the Acting Quartermaster General.

BENJ. L. JACOBSON,
Lt. Col. Q. M. Corps, Executive Officer.

400.15 A–OR
S–4030–B

WAR DEPARTMENT,
PURCHASE, STORAGE & TRAFFIC DIVISION,
OFFICE OF THE DIRECTOR OF
PURCHASE AND STORAGE,
Washington, December 2, 1918.

Purchase & Storage Notice No. 109.
Subject: List of Purchasing and Contracting Officers.

1. As provided in paragraph 5 of Notice No. 66, from the Office of the Quartermaster General, dated August 7, 1918, the following officers having been nominated and appointed as Purchasing and Contracting Officers for the places and stations indicated, such appointments being with general contracting powers and for an indefinite period of time, unless otherwise stated:

(A) PROCUREMENT DIVISIONS, O. Q. M. G.

Clothing & Equipage Division:
Lt. Col. R. W. Lea.
Major H. M. Schofield.
Capt. A. J. Farnsworth.
Capt. S. W. Shaffer.
Capt. H. G. Straus.

Leather Subdivision, C. & E. Division:
Lt. Col. Geo. B. Goetz.
Capt. A. F. Cochran.
Capt. J. D. Goodpasture.
Capt. James H. Harphan.

Salvage Division:
Lt. Col. P. N. Merzig.
Capt. W. L. Lester.

General Supplies:
Major E. A. Darr.
Major H. P. Hill.
Lt. C. W. Bliss.

Machinery & Engineering Division:
Lt. Col. Earl Wheeler.
Lt. Col. C. H. Crawford.
Capt. L. D. Waldron.

Motors and Vehicles Division:
Col. E. L. George.
Col. Fred Glover.
Major A. H. Zacharias.
Capt. W. R. Metz.
Capt. C. E. Fruddan.
Capt. W. A. Rosenfield.
Lt. A. M. Wilmit.
Raw Materials Division:
Paint Branch:
Capt. A. O. Van Suetendael.
Lt. H. R. Willets.
Oil Branch:
Lt. Col. U. G. Lyons.
Capt. L. E. Molineaux.
Remount Division:
Major H. E. Strawbridge.
Capt. J. W. Appleton.
Capt. W. S. Cameron.
Capt. J. J. McCartney.
Capt. A. H. Higgenson.
Capt. C. Robbins.
Capt. M. M. Smith.
Subsistence Division:
Forage Branch:
Major John Roberts.
Major H. J. Owens.

(B) GENERAL SUPPLY DEPOTS

Atlanta, Ga.:
Lt. Col. C. R. Gray.
Major Geo. M. Alden.
Capt. L. W. Winterberger.
Capt. G. E. Dolge.

Baltimore, Md.:
Major A. M. Miller.
Major J. E. Schiller.
Shipping Control Committee:
Lt. Edward Schranz, Jr.
Zone Supply & Port Storage:
Lt. J. J. Winn.
Boston, Mass. (Cambridge):
Col. A. W. Yates.
Major W. K. Nash.
Capt. T. G. Turner.
Capt. H. L. Ewer (Wool).
Chicago, Ill.:
Major E. J. Zimmerman (Salvage).
Major G. H. Caswell (General Supplies).
Major Geo. F. Mayer (Clothing & Equipage).
Capt. L. Allen (Motors).
Capt. J. C. Shugert (Subsistence).
Capt. H. M. Rogers (Fuel & Forage).
Capt. E. A. Hey (Grocery).
Capt. S. Morris, Jr. (Meat).
Capt. Edward Rosing (Const. Reps. & Service).
Lt. J. A. Crandall (Vehicles & Harness).
El Paso, Texas.:
Lt. L. D. Lawson.
Jeffersonville, Ind.:
Major Marshall T. Levey.
Major Wm. J. Bass.
Capt. F. M. Houston.
Capt. L. W. Neidhardt.
Capt. C. R. Sherman.
New Orleans, La.:
Capt. P. T. Murphy.
Capt. C. A. Semler.

Newport News, Va.:
Capt. M. R. Ginn.
Lt. H. W. Bryan (Subsistence).
New York, N. Y.:
Capt. J. R. Holt.
Lt. P. M. Hooper.
Lt. Lewis D. Gross.
Director of Shipping:
Capt. W. L. MacQuillian.
Office of Supt. of Transport Service:
Lt. Col. F. F. Jackson.
Post Utilities:
Major C. W. Yeomans.
Omaha, Nebraska:
Lt. M. J. Sannebeck.
Philadelphia, Pa.:
Major A. L. Lemon.
Lt. P. W. Tucker.
Expeditionary Depot:
Capt. D. L. Coulbourn.
Shipping Control:
Lt. Col. Graham Parker.
Capt. C. A. Page.
San Antonio, Tex.:
Capt. F. M. Kerr (Clothing & Equipage).
Capt. T. Otis Baker (Subsistence).
Lt. L. W. Coyle (Fuel & Forage).
Post C. & E. Officer:
Major E. W. Scott.
San Francisco, Cal.:
Major M. L. Gerstle.
Capt. H. K. Weidenfield (Subsistence).
St. Louis, Mo.:
Major Robert Field.

Washington, D. C.:

Capt. H. A. Barnard.

2. This list replaces the list published in Office of the Quartermaster General Notice No. 179.

3. Quartermasters of all depots, camps, forts, posts, and other military establishments who have not nominated officers for appointment as Purchasing and Contracting Officers, as required by Paragraph 3 of Notice 66, dated August 7, 1918, are directed to submit names for such appointments to the Office of the Director of Purchase and Storage.

By authority of the Director of Purchase and Storage.

B. B. Downs,
Major, Quartermaster Corps,
Administrative Control Branch
General Administrative Division.

○